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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MICHAEL O'LEARY, Warden,

Petitioner,

vs.

GEORGE DUNCAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the concept of procedural default is violated where habeas corpus relief is granted upon a finding that trial counsel's performance was adversely affected by a conflict of interest, a specific constitutional argument which the habeas applicant expressly refused to raise in his state court proceedings?

2. Whether the concept of procedural default is gravely offended when a federal court grants habeas corpus relief on the basis of a factual showing which is "significantly" different from those facts presented to the state courts on a constitutional issue?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW ..	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	3
REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED:	
BY PERMITTING A HABEAS CORPUS PETITIONER TO RAISE A SPECIFIC CONSTITUTIONAL CLAIM IN FEDERAL COURT WHICH HE EXPRESSLY REFUSED TO PRESENT IN STATE COURT, AND BY ALLOWING PETITIONER TO PRESENT A FACTUAL BASIS IN SUPPORT OF HIS CLAIM WHICH HE EXPRESSLY DISAVOWED IN STATE COURT, THE COURTS BELOW DISREGARDED BINDING PRECEDENT OF THIS COURT AND VIOLATED ESTABLISHED STANDARDS OF COMITY AND FEDERALISM	12
CONCLUSION	23
APPENDIX A:	
Slip Opinion, United States Court of Appeals for the Seventh Circuit—*U.S. ex rel. Duncan v. O'Leary*, ____ F.2d ____ (7th Cir. No. 85-2761, announced Nov. 24, 1986) ...	App. 1
APPENDIX B:	
Order of the United States Court of Appeals for the Seventh Circuit Denying the Petition for Rehearing, December 22, 1986	App. 16

APPENDIX C:

Order of United States District Court, Central District of Illinois—*U.S. ex rel. Duncan v. O'Leary*, No. 84 C 2368 (C.D. Ill.) .... App. 17

APPENDIX D:

Decision of Illinois Appellate Court, Third District—*People v. Duncan*, 97 Ill. App. 3d 896, 424 N.E.2d 67 (3d Dist. 1981) ..... App. 40

TABLE OF AUTHORITIES

	PAGE
Anders v. California, 386 U.S. 738 (1967)	9
Anderson v. Harless, 459 U.S. 4 (1982)	12
Brown v. Estelle, 701 F.2d 494 (5th Cir. 1983) ...	21
Cuyler v. Sullivan, 446 U.S. 335 (1980)	9, 15
Duckworth v. Serrano, 454 U.S. 1 (1981)	12
Engle v. Isaac, 456 U.S. 107 (1982)	19
Fay v. Noia, 372 U.S. 391 (1963)	15
Jones v. Hess, 681 F.2d 688 (10th Cir. 1982)	21
Murray v. Carrier, ____ U.S. ____, 106 S.Ct. 2639 (1986)	19
People v. Davis, 97 Ill. 2d 1, 452 N.E.2d 525 (1983)	16
People v. Duncan, 97 Ill. App. 3d 896, 424 N.E.2d 67 (3d Dist. 1981)	2, 8, 17

People v. Stoval, 40 Ill. 2d 109, 239 N.E.2d 441 (1968) 8

People v. Thomas, 38 Ill. 2d 321, 231 N.E.2d 436 (1967) 19

Stranghoener v. Black, 720 F.2d 1005 (8th Cir. 1983) 21

United States v. Brooks, 677 F.2d 907 (D.C. Cir. 1982) 22

Vasquez v. Hillery, ___ U.S. ___, 106 S.Ct. 617 (1986) 21

Wainwright v. Sykes, 433 U.S. 72 (1977) 13

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit in *U.S. ex rel. Duncan v. O'Leary*, ____ F.2d ____ (7th Cir. No. 85-2761, announced Nov. 24, 1986) is not yet reported; a copy of the slip opinion is appended to this petition as Appendix A.

The decision of the district court Order granting habeas corpus relief to Respondent Duncan (*U.S. ex rel. Duncan v. O'Leary*, No. 84 C 2368 (C.D. Ill.)) is not reported; a copy of that Order is appended as Appendix C.

The decision of the Illinois Appellate Court, Third District, affirming Respondent Duncan's conviction for murder is reported as *People v. Duncan*, 97 Ill. App. 3d 896, 424 N.E.2d 67 (3d Dist. 1981). This decision is reproduced herein as Appendix D.

JURISDICTION

Respondent Duncan filed an application for federal habeas corpus relief under 28 U.S.C. § 2254. After relief was granted by the district court the Petitioner sought review of that decision by the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. §§ 1291 and 2253.

On November 21, 1986, a panel of the Court of Appeals issued an opinion affirming the Order of the district court. Petitioner filed a timely Petition for Rehearing from that decision, but the Court of Appeals denied that relief on December 22, 1986. This order is reproduced herein as Appendix B.

Within ninety (90) days of that last order below, Petitioner lodged the instant petition for writ of *certiorari*, invoking the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

George Duncan, Respondent, was indicted and convicted in 1980 in Peoria County, Illinois, on charges that he murdered his girlfriend Yvette Searle. Respondent has never denied that he performed the acts causing death, and indeed has never seriously maintained that he was innocent of wrong-doing; he has instead defended on the issue of whether his acts constituted murder or manslaughter as a matter of Illinois law. Respondent is presently the beneficiary of a ruling by the United States Court of Appeals for the Seventh Circuit, directing that he be afforded a new trial on the murder charge. The following facts are relevant for purposes of the instant petition.

I. STATE COURT PROCEEDINGS

After Respondent was charged, the prosecution of his case was assigned to Peoria County Assistant State's Attorney Joseph Gibson. Gibson was, during this same period in 1980, his party's nominee as candidate for county state's attorney in the autumn general election. (C. 104)[1] Defendant Duncan, after retaining and later discharging other counsel, hired attorney Dorian LaSaine as his defense attorney. (R. 541, 558-560) LaSaine was a long-time social acquaintance and friend of Gibson's, a fact of which

[1] Citations to the Common Law Proceedings of Duncan's state court trial are denoted "C. ____". Citations to the Transcript of Proceedings are denoted "R. ____". Citations to the record of Duncan's post-trial proceedings in state court are denoted "P.C. ____". Citations to the transcript of the federal habeas corpus hearing in this cause are denoted "Tr. ____". The remainder of the district court record is cited "D.R. ____".

Duncan was aware and which he hoped LaSaine could exploit on his behalf. (R. 562-565)

When Duncan hired LaSaine to defend him, the latter was then serving as the campaign manager for Gibson's candidacy for office. (R. 499-500) This position was a non-salaried, voluntary enterprise. (Tr. 73) Although LaSaine repeatedly has stated that he notified Duncan of his role as Gibson's campaign manager (R. 504-518; Tr. 77, 100) Duncan has not clearly indicated whether he grasped this fact when his trial began. (*Compare* R. 582-84 *with* Tr. 65-66) In any event, before Duncan's prosecution commenced the following colloquy was held:

> THE COURT: Mr. Duncan, I have been advised that your attorney, Mr. LaSaine, is a campaign manager for the Assistant State's Attorney in this case, Mr. Gibson. Mr. Gibson was running for the office of State's Attorney in the November election, and your attorney, Mr. LaSaine, apparently, is his campaign manager, which means that he would be working on behalf of Mr. Gibson in his election.
>
> DEFENDANT DUNCAN: Yes, sir.
>
> THE COURT: Do you understand that?
>
> DEFENDANT DUNCAN: Yes, sir.
>
> THE COURT: Has Mr. LaSaine told you that?
>
> DEFENDANT DUNCAN: Yes.
>
> THE COURT: All right. And I believe it will be my duty to advise you, Mr. Duncan, that there could arise a possible conflict of interest in Mr. LaSaine's representing you in this case. I'm not saying that it is present nor that it would arise, but I have to make you aware of the fact, and I think Mr. LaSaine has already. But I have to make you aware of the fact that there could be what is known in law as a potential conflict of interest in his representing you in this case, a conflict of interest between his representing

you and also by reason of his allegiance to Mr. Gibson because of his activities, political activities.

Do you understand?

DEFENDANT DUNCAN: Yes, sir.

THE COURT: Now, have you hired Mr. LaSaine as your attorney?

DEFENDANT DUNCAN: Yes, sir.

THE COURT: And I want to just give you an example of how this potential conflict of interest could arise, how it could affect you.

It can arise, as I say, because of a dual—not a dual representation but a dual—I want to put this in words so I am sure that you'll understand it.

(Pause.)

During the cross examination of witnesses, for example, Mr. Duncan, it might be necessary for Mr. LaSaine to attempt to show up Mr. Gibson, all right? To show up the evidence that he may be attempting to present against you at your trial. And in a very subtle or a very hidden manner, Mr. LaSaine, if this conflict of interest would affect him, could restrain himself from fully representing you by not vigorously cross examining witnesses. Do you understand?

DEFENDANT DUNCAN: Yes.

THE COURT: That's one example of a conflict of interest that I'm talking about to you.

Do you understand?

DEFENDANT DUNCAN: Yes, sir.

THE COURT: All right. I'm, in no way, stating his representation of you would be anything than vigorous and honorable, but I am, in no manner, stating to you that that possibility could not possibly exist anyway because of this allegiance, you might call it, to Mr. Gibson.

DEFENDANT DUNCAN: Yes, sir. I have—

THE COURT: Do you understand what I'm saying to you?

DEFENDANT DUNCAN: Yes, sir.

THE COURT: Do you have any questions that you want to ask me about this problem that I'm discussing with you?

DEFENDANT DUNCAN: Well, yes sir. I have complete confidence in Mr. LaSaine, but I didn't know that he was campaign manager.

THE COURT: Uh-huh.

DEFENDANT DUNCAN: But I have complete confidence in him.

THE COURT: All right. Now, I am, in no way, stating that there is any conflict of interest in this case, but it's my duty as a judge to advise you and let you know that there is always that possibility, and you have the right to waive or to give up any possible conflict of interest that there could be in this case, you see, and that's why I'm stating these facts to you. And I'm asking you now, at this time, knowing what I have said to you and understanding what I've said to you, do you wish Mr. LaSaine to continue to represent you in this case?

DEFENDANT DUNCAN: Yes, sir.

THE COURT: Okay. And you understand that you will be giving up any right that you may have at a later time to complain of Mr. LaSaine's representation of you for the reason that there was a conflict of interest because he is involved with Mr. Gibson and Mr. Gibson's political campaign?

DEFENDANT DUNCAN: Yes.

THE COURT: Okay. That's all.

(P.C. 73-77) Duncan's case thereafter proceeded before a jury which convicted him of murder.

After Duncan's conviction, defense counsel LaSaine withdrew from the case and new counsel, Mr. Seritella, was retained to represent Duncan in his motion for post-trial relief. (R. 493) Seritella filed a Motion For A New Trial alleging that Duncan was deprived of his sixth amendment right to the effective assistance of counsel. (C. 104) A hearing on that motion was conducted in a Peoria County circuit court in July, 1980. During this hearing testimony was received on the circumstances surrounding Duncan's decision to hire LaSaine and on the nature of LaSaine's role as Gibson's campaign manager.

During these post-trial proceedings in the Illinois court, Duncan's counsel expressly notified the presiding judge that he could not prove that LaSaine failed to "go all out" for his client, and he emphasized that he was making no effort to demonstrate that LaSaine's performance as trial defense counsel was anything less than vigorous and competent. Counsel disclaimed any effort at proving that LaSaine and Gibson acted in concert to use Duncan's case for Gibson's political advantage. (R. 585; P.C. 33-36) Rather, counsel urged that the circumstances created "the appearance of impropriety" (P.C. 36) calling for reversal of the conviction, and that Duncan had not effectively waived this sixth amendment claim. (P.C. 40-43)

After receiving testimony, the trial judge granted Duncan another month "for completion of any evidence to be presented on the Motion For New Trial and to give Mr. Seritella the opportunity to obtain a copy of the Transcript of the testimony so that he may, then, file any additions to his written Motion for New Trial." (R. 646) When the cause was reconvened, Duncan's counsel stated that there were no additional issues he wished to bring to the court's attention. The trial court thereafter denied the post-trial motion, finding that although a potential con-

flict of interest existed, Duncan had made a knowing and voluntary waiver of his right to seek relief on those circumstances. (P.C. 62, 63) Duncan was sentenced to forty (40) years in prison. (C. 118)

Duncan next brought an appeal to the Appellate Court of Illinois, Third Judicial District, where he argued that on the facts of his case, the court should invoke the *per se* conflict of interest rule adopted by the Illinois Supreme Court in *People v. Stoval*, 40 Ill. 2d 109, 239 N.E.2d 441 (1968), and thereby relieve him of the responsibility of establishing that counsel's representation was in fact affected by a conflict. The appellate court found that (1) while LaSaine's representation of petitioner created the appearance of impropriety, there existed no actual conflict, (2) petitioner had not suggested that LaSaine's services in the case were deficient in any way, (3) he had not complained of any other aspect of his trial, and (4) the record reflected that he had received an effective, vigorous defense. The court further found that petitioner was fully informed of the potential conflict of interest yet affirmatively stated that he desired LaSaine's continued representation. In light of these circumstances, the court found that the trial judge acted properly in not requiring that LaSaine or Gibson be taken off the case. *People v. Duncan*, 97 Ill. App. 3d 896, 424 N.E.2d 67 (3rd Dist. 1981). Duncan's Petition for Leave to Appeal to the Illinois Supreme Court was denied November 30, 1981. (D.R. 1, p. 2)

Petitioner thereafter sought post-conviction relief in the state court (*see* Ill. Rev. Stat. ch. 38, § 122-1 *et seq.*) on the conflict-of-interest claim. After counsel was appointed, his petition was dismissed because the "issues alleged . . . could have been raised . . . or in fact were litigated . . ." in his post-trial and appellate actions. (D.R. 1, App.

C; D.R. 25, Ex. A) Still another attorney was appointed to assist Duncan in seeking appellate review of this dismissal, the same attorney who would later present Duncan's petition for federal habeas corpus. After review of the record, this appointed counsel sought and received leave to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967); counsel notified the Illinois Appellate Court that the "extensive" state court hearings on the post-trial motion had fully developed Duncan's sixth amendment claim such that any further review was barred under Illinois *res judicata* principles.

II. FEDERAL COURT PROCEEDINGS

Duncan filed his federal habeas corpus application in July of 1984, where his counsel again pressed the conflict-of-interest issue. The State of Illinois moved to dismiss the petition, noting that petitioner had failed to allege that any perceived conflict resulted in an instance wherein trial counsel acted adversely to his client's interest, relying on *Cuyler v. Sullivan*, 446 U.S. 335 (1980).

The district court did not direct Duncan's counsel to respond to this argument. Rather, it *sua sponte* ordered that an evidentiary hearing be conducted to determine whether LaSaine's representation of Duncan was adversely affected by a conflict of interest, and also to determine whether Duncan had effectively waived any claim concerning an alleged conflict of interest. (D.R. 12) Illinois immediately requested reconsideration of this order, pointing out that Duncan had expressly disavowed any constitutional claim that his counsel's performance was inadequate, and had expressly refused an invitation to develop facts in support of such a claim, during Duncan's state court proceedings. (D.R. 14) The district court denied that

motion the day it was received, without explaining its reasons. (D.R. 2/4/85 Docket Entry) Subsequently, Illinois made further efforts to persuade the district court that Duncan's adverse performance claim, and his efforts to adduce facts supporting that claim, were barred by the concepts of procedural default. The State further pointed out that, to the extent Duncan now sought to raise his claim of adverse affect or incompetent performance by trial counsel, his re-fashioned claims were subject to dismissal on exhaustion grounds, in that relief could again be sought under the Illinois Post-Conviction Act. (D.R. 25) These efforts likewise proved futile.

The district court conducted its evidentiary hearing June 7, 1985. Duncan, his brother, and several other witnesses testified in support of petitioner's contention that LaSaine's performance as trial defense counsel, both in terms of pre-trial preparation and in courtroom performance, fell below the minimum standards of professional competence. Gibson and LaSaine testified for the respondent officials, insisting that the Gibson candidacy had no impact whatsoever on either the prosecution or the defense efforts at Duncan's trial.

On October 1, 1985, the district court granted a writ of habeas corpus to Duncan on the grounds that defense counsel LaSaine's conflict of interest was an actual conflict of interest which caused an adverse impact on LaSaine's performance in representing Duncan. (D.R. 35) Much of the district court's factual analysis was predicated upon testimony offered at the evidentiary hearing by one Patricia Brandt. (D.R. 35, p. 22-23) Ms. Brandt was employed as LaSaine's legal secretary during Duncan's 1980 murder trial. (Tr. 32) Although Ms. Brandt lived in the Peoria area at all times since 1980, and although it was known by petitioner's various counsel that she was La-

Saine's secretary until April of 1981, she had never been asked to testify in any state court proceeding regarding Mr. Duncan's case. (*Id.*) She was first contacted to testify on Duncan's behalf when Duncan's brother, a Peoria policeman, asked her to testify at the federal evidentiary hearing. (Tr. 45)

The district court made three rulings in granting habeas corpus relief: first, that there was collusion between Gibson and LaSaine to use Duncan's case to Gibson's political advantage; second, that Duncan had adduced facts proving that LaSaine's performance as trial counsel was adversely affected by the conflict of interest existing during his representation of Duncan; and finally that Duncan had not rendered a knowing and voluntary waiver of his right to the effective assistance of counsel. (D.R. 35) The court ordered Duncan released unless, within 120 days, the State of Illinois afforded him a new trial.

The State of Illinois immediately sought appellate review of this decision before the United States Court of Appeals for the Seventh Circuit. The State's primary contentions on appeal were that Duncan had procedurally defaulted on his claim that his counsel's performance was adversely affected by the conflict of interest, not simply because he failed to raise such a claim in the Illinois courts, but because he had expressly disavowed any intent to raise such an allegation of error. Further, the State urged that Duncan had committed a separate, independent default when he expressly declined an opportunity to develop facts in support of his competence of counsel claim in the state court; he had not only defaulted as to the specific legal claim on which federal relief was granted, he had defaulted on the opportunity to develop a factual record in support of that claim. Finally, the State of Illinois urged that analysis of the facts and claims which

were properly before the district court compelled the conclusion that no sixth amendment error occurred, and as such the petition should be dismissed.

On November 24, 1986, a panel of the Seventh Circuit affirmed the district court's order in its entirety. A subsequent petition for rehearing was denied on December 22, 1986. The People of the State of Illinois, petitioning through the person of Warden Michael O'Leary, now seek review of that decision.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

BY PERMITTING A HABEAS CORPUS PETITIONER TO RAISE A SPECIFIC CONSTITUTIONAL CLAIM IN FEDERAL COURT WHICH HE EXPRESSLY REFUSED TO PRESENT IN STATE COURT, AND BY ALLOWING PETITIONER TO PRESENT A FACTUAL BASIS IN SUPPORT OF HIS CLAIM WHICH HE EXPRESSLY DISAVOWED IN STATE COURT, THE COURTS BELOW DISREGARDED BINDING PRECEDENT OF THIS COURT AND VIOLATED ESTABLISHED STANDARDS OF COMITY AND FEDERALISM.

Within the past decade this Court has devoted considerable energy to the concerns for comity and federalism which inhere in habeas corpus litigation under 28 U.S.C. § 2254. One of the immutable principles which has resulted from these efforts is the requirement that a state court must have the complete opportunity to review and decide constitutional claims of error before such error may provide the basis for habeas corpus relief. *See, e.g., Anderson v. Harless*, 459 U.S. 4 (1982); *Duckworth v. Serrano*, 454 U.S. 1 (1981).

The case at bar represents a clear departure from this rule of law by the United States Court of Appeals for the Seventh Circuit. That court has granted habeas relief on the basis of a specific sixth amendment claim which was never fairly presented to the Illinois courts, thereby violating the doctrine of procedural default. *Wainwright v. Sykes*, 433 U.S. 72 (1977). Of equal concern is the showing herein that the Seventh Circuit premised its holding on certain facts adduced at a federal evidentiary hearing; these facts not only were never presented to any Illinois court, the Illinois courts were expressly told that such facts did not exist and could not be proved. This independent procedural default, made at a time when the Illinois courts literally invited the defendant to produce facts supporting any claims he wished to raise, was also excused by the Seventh Circuit.

In excusing Respondent Duncan from these separate procedural defaults, the Court of Appeals gravely misconstrued Illinois law, giving to Illinois cases a tortured construction which is wholly unsupportable. Further, that court misconstrued, or simply ignored, direct precedent from this Court demonstrating that Respondent Duncan should have been barred from seeking relief on defaulted claims. These egregious errors are further magnified by the fact that Respondent Duncan is a demonstrably guilty, already-convicted murderer. Under such circumstances, the State of Illinois is constrained to seek relief from this Court.

The nature and extent of this error is best illustrated by consideration of the following facts. In 1980, Respondent Duncan was represented by competent counsel in post-trial proceedings following his conviction for murder. Duncan sought a new trial solely because his trial counsel (LaSaine) allegedly suffered from a conflict of interest dur-

ing his efforts to represent Duncan, and in raising the issue Duncan quite clearly relied upon Illinois cases which erect a *per se* rule of reversal in certain circumstances. Duncan's attorney told the Illinois court that, because *per se* reversal was supposedly required, Duncan would *not* claim that LaSaine's actual performance at trial was adversely affected by a conflict of interest. To the contrary, Duncan assured the Illinois court, LaSaine's efforts were vigorous and competent, and he had "go[ne] all out" to champion his client's cause to the jury.

Even at this juncture in 1980, the Illinois court acted cautiously. Because Duncan's counsel at post-trial proceedings had not been present at trial, counsel was given a month to review the transcript of Duncan's trial to ascertain whether it revealed the basis for any other claims of error. Counsel then informed the trial court, a month later, that he saw no other issues on the record; thus, counsel's review did not prompt him to allege that trial counsel was adversely affected by the alleged conflict of interest, nor did he perceive facts suggesting that Duncan's sixth amendment rights were transgressed in any other way.

Over six years after Respondent expressly declined to allege that his trial counsel's performance was constitutionally deficient, six years after Respondent declined invitations by the State court to adduce any facts in support of a claim of deficient performance, the Seventh Circuit Court of Appeals vacated Respondent's murder conviction. The Court of Appeals did so by addressing the precise argument previously discounted by Respondent Duncan. The Court of Appeals ruled on the basis of facts which were never presented to any Illinois court, indeed, facts which Respondent Duncan had assured the Illinois judiciary did not exist. To accomplish this startling result,

the Court of Appeals blandly stated that Respondent Duncan "has given the state courts a full chance to correct any federal constitutional errors." *U.S. ex rel. Duncan v. O'Leary*, Appendix A, slip op. at 12.

This assertion by the Seventh Circuit is factually incorrect, is demonstrably wrong as a matter of law, and simply defies common sense. It betrays a fundamentally flawed understanding of this Court's precedent. The facts of this case may well suggest that Respondent Duncan deliberately by-passed existing state court remedies for resolution of his claim that counsel suffered from a conflict of interest which adversely affected counsel's performance at trial. *Fay v. Noia*, 372 U.S. 391 (1963). But even if no deliberate by-pass were shown, it is apparent that Respondent has procedurally defaulted on any claim of adverse effect, and has procedurally defaulted the opportunity to adduce facts supporting his allegations of adverse effect. Therefore, the decision to grant habeas corpus relief to a convicted murderer was clearly erroneous as a matter of law and must be reversed.

The Seventh Circuit determined that Respondent fairly presented his claim to the Illinois court. The lower court reasoned that the State of Illinois erects different standards for review of a sixth amendment conflict of interest claim than do the federal courts. To a limited extent, not determinative of the issues here, this is true. The federal standard is set forth in *Cuyler v. Sullivan*, 446 U.S. 335, 348, 350 (1980) and requires a showing that counsel labored under an actual conflict of interest which adversely affects counsel's performance. The State of Illinois, by contrast, breaks such conflict of interest claims into two categories. If defense counsel's conflicting obligations relate to a matter of professional or pecuniary gain, prejudice is presumed and a *per se* rule of reversal ob-

tains. *People v. Davis*, 97 Ill. 2d 1, 452 N.E.2d 525 (1983). However, if counsel's conflict arises from personal or social obligations or some similar non-pecuniary circumstance, the complaining party must demonstrate that the conflict adversely affected counsel's performance. *Id.*, 452 N.E.2d at 532.

Seizing upon this distinction between the jurisdictions, the Seventh Circuit determined that "[s]ince Illinois courts apply the *per se* standard *to conflict claims of the type raised* by [Duncan], the Illinois courts would not have had any greater chance to correct constitutional errors if [Duncan] had argued his claims in terms of the *Cuyler* standard." Appendix A, slip op. at 12 (emphasis supplied). This statement is wholly wrong.

First, the Seventh Circuit is wrong to state that Illinois applies its *per se* reversal rule to claims "of the type raised" by Respondent. Significantly, the Seventh Circuit cited no Illinois case to support this assertion. No such case exists in the annals of Illinois law. No Illinois decision prior to 1980 ever considered whether the relationship of candidate/campaign manager creates a *per se* reversal situation, but precedent such as *People v. Davis*, *supra*, clearly suggests that the *per se* rule would not apply where (as here) the relationship was premised on social friendship instead of financial benefit. More to the point, when Duncan's attorney argued the post-trial motions in 1980, he had absolutely no precedent on which he could base an assumption that the Gibson/LaSaine relationship would be viewed as sufficient to create a *per se* situation. It was clearly encumbent on Duncan's counsel in 1980 to attempt a showing of adverse performance, if one could be made.

Second, when Duncan's attorney made his 1980 disavowal of any claim that LaSaine's performance was ad-

versely affected, he was faced with a direct incentive to produce evidence of such an adverse effect. Duncan had, after all, entered into a lengthy colloquy with the trial court which appeared to result in a waiver of his complaints about the conflict of interest. The possibility was thus quite strong that his invocation of the *per se* rule of reversal, even if accepted by the Illinois court in the abstract, would not prevail over his apparent waiver of the claim. It was again encumbent upon counsel to raise the allegation of adverse impact and produce proof in support of that specific claim.

Third, the Illinois Appellate Court's decision in this case, *People v. Duncan*, 97 Ill. App. 3d 896, 424 N.E.2d 67 (3d Dist. 1981) certainly should have demonstrated to the Seventh Circuit that its reading of Illinois law was flawed. That court rejected Respondent Duncan's sixth amendment, conflict of counsel claim, but *not* by analyzing the Illinois *per se* reversal rule. Instead, that court held that, "under the circumstances" of the case, no reversal was required.

> These circumstances, however, should be defined. Mr. LaSaine was the defendant's private hired counsel. The defendant was fully informed as to the conflict of interest situation. The defendant affirmatively stated that he wanted to continue with Mr. LaSaine's services in the case. No objection was raised by the defendant until after his conviction when he filed a post-trial motion. There is *no suggestion* that Mr. LaSaine's *services were deficient in any way.* No issue is raised on the pleadings. No issue is raised concerning *any other aspect of the trial.*

Id., 424 N.E.2d at 69 (emphasis supplied).

This language could hardly be clearer. Contrary to the Seventh Circuit's bald assertion, Illinois law did not view these facts as raising the stringent *per se* rule of rever-

sal. Contrary to the Seventh Circuit's incredible comment that "the Illinois courts would not have had any greater chance to correct constitutional errors if" Respondent proved up his claims of adverse affect, the Illinois Appellate Court quite clearly would have had a "greater chance" to resolve the merits of his constitutional claim if they had been presented with the specific claim and the facts in support of the claim. Obviously, the Illinois Appellate Court premised its finding of waiver on the belief that Duncan knew all relevant facts when he was questioned on the conflict before trial. Just as obviously, the Illinois Appellate Court's finding of waiver would have been impossible had Duncan shown in state court that he was prejudiced by events of which he was unaware, or if Duncan had claimed that his attorney's performance was actually deficient.

But the Illinois courts were never permitted to consider those facts which formed the basis for the federal writ of habeas corpus; they were repeatedly told no claims of adverse impact existed because no proof existed to support such claims. After the Illinois courts premised their constitutional rulings on these representations by Duncan's counsel, in a published decision expressly relying on those representations, the Seventh Circuit wholly ignored that opinion and ruled that Illinois is "a jurisdiction that does not apply [the *Cuyler*] standard [requiring proof of adverse affect] for the type of claim raised by [Duncan]." This error would be troubling under any circumstance; the fact that it wreaks such violence on the notions of comity, in a case involving a demonstrably guilty murderer, should be a profound cause for concern by this Court.

The Seventh Circuit's decision is erroneous in yet another critical respect. Even if one were to assume *arguendo* that Illinois law did not require Duncan to show

adverse effect in order to win a *per se* reversal as a matter of State law, the Seventh Circuit was wrong to hold that such fact excuses Duncan's failure to allege and demonstrate that a conflict of interest adversely affected LaSaine's performance. This Court's recent decision in *Murray v. Carrier*, ____ U.S. ____, 106 S.Ct. 2639 (1986), coupled with *Engle v. Isaac*, 456 U.S. 107 (1982) make clear the rule that futility in presenting a claim cannot alone constitute cause for depriving the state courts of the opportunity to consider that claim. Moreover, even if Duncan's post-trial counsel believed (incorrectly, as noted above) that existing precedent in Illinois would not require him to demonstrate adverse effect resulting from the conflict, the Illinois Appellate Court opinion quoted above certainly dashed that illusion. Once the Illinois court "red-flagged" the need to show adverse impact ("there is no suggestion that Mr. LaSaine's services were deficient in any way") counsel could have sought state post-conviction relief to allege that facts *de hors* the record would demonstrate incompetence of counsel. *See, e.g., People v. Thomas*, 38 Ill. 2d 321, 231 N.E.2d 436 (1967). While the State of Illinois argued below that the development of this case raised the prospect that an exhaustible remedy exists in this regard, the courts below utterly failed to resolve that question.

It is clear that Respondent procedurally defaulted on his right to present the specific constitutional claim that LaSaine's performance was adversely affected by a conflict of interest. Illinois law applied no *per se* rule of reversal to claims such as his, leaving his claim in that category of cases for which both Illinois and federal law require a demonstration of adverse impact on defense counsel's performance. Further, Respondent's apparent pre-trial waiver of a conflict of interest claim in open court cer-

tainly was incentive for Respondent to allege, as an alternative to his *per se* argument, that his trial counsel's performance was adversely affected. Third, the Illinois Appellate Court's decision in Duncan's own direct appeal expressly demonstrated that the Illinois courts required a showing of adverse impact to support the type of claim raised by Respondent. Finally, it is obvious that Illinois provided Duncan with the appropriate procedural mechanism to raise each claim later considered by the federal courts.

This Court's Rule 17.1(c) states that the Court may be inclined to grant relief where it is shown that a federal court of appeals "has decided a federal question in a way in conflict with applicable decisions of this Court." Petitioners invoke this criterion here, insisting that the decision below cannot be squared with the decisions in *Engle*, *Sykes* or *Murray*. It is highly inappropriate to vacate a state conviction on the basis of a specific constitutional claim which was simply not presented to any Illinois court for consideration.

This Court's Rule 17.1(c) also refers to this Court's interest in a *certiorari* petition raising "an important question of federal law which has not been, but should be, settled by this Court." Such a question is presented herein. In 1980, the Illinois courts were presented by Respondent with a particular sixth amendment claim which in turn was based on a particular fact: LaSaine was prosecutor Gibson's campaign manager. Yet in 1986 a writ of habeas corpus was issued to correct alleged constitutional error, based on "testimony [which] *significantly changed* the facts that were known [to the Illinois courts] in 1980." Appendix A, slip op. 7 (emphasis added).

Petitioner asserts that the logical underpinnings of the procedural default doctrine are seriously distorted if habeas applicants are permitted to allege constitutional error in a federal court on the basis of facts which are "significantly" different from those presented to a state court in support of such a claim. It is true that most federal circuits recognize the need to dismiss habeas cases on exhaustion grounds when new, material facts are alleged in support of a claim. *See, e.g., Brown v. Estelle,* 701 F.2d 494 (5th Cir. 1983); *Stranghoener v. Black,,* 720 F.2d 1005 (8th Cir. 1983); *Jones v. Hess,* 681 F.2d 688 (10th Cir. 1982). And it is likewise true that this Court has approved the power of district courts "to clarify the relevant facts" on a constitutional claim, where those additional clarifying facts "introduced no claim on which the state courts had not passed." *Vasquez v. Hillery,* ___ U.S. ___, 106 S.Ct. 617, 620, 621 (1986). But *Vasquez* expressly declined to address the circumstances present in this case, wherein a habeas applicant withheld "essential facts from the state courts" (*Id.* at 622) and sought to later use those withheld facts in federal court as a basis for a specific allegation of constitutional error which was likewise never presented to the state courts. The time has come for this Court to rule as logic dictates: the material facts in support of a constitutional claim must be fairly presented to the state courts as a condition precedent to their consideration on federal habeas review, and these factual presentations are subject to the same rules on exhaustion and procedural default governing the presentation of the underlying constitutional claim.

The case at bar provides an appropriate vehicle for such a ruling. Illinois obviously provided Respondent with the procedural means to marshall facts to support his claim of adverse impact. The witnesses presented by Duncan

at his 1985 federal habeas corpus evidentiary hearing were available to him during his 1980 post-trial proceedings. The decision below utterly failed to address Illinois' contention that Duncan should have presented their testimony in 1980 and that his failure to do so constitutes a procedural default. As a result, two undesirable results have obtained. First, the concept of procedural default has been distorted, for Illinois habeas petitioners are now free to present new facts in support of their claims notwithstanding their failure to provide those facts to the State courts in accord with Illinois law. Second, inasmuch as federal courts require demonstration of facts proving actual prejudice in cases involving a prejudice element (*United States v. Brooks*, 677 F.2d 907, 911, n.3 (D.C. Cir. 1982)), it appears that the Seventh Circuit requires factual specificity from federally-convicted appellants, but has denied the State of Illinois the right to demand equal specificity from its putative habeas applicants.

These undesirable results can be avoided by a ruling from this Court which requires, pursuant to the logic of *Wainwright v. Sykes*, that a habeas applicant's failure to present facts supporting his allegation to the state courts, where such is required by law, constitutes a procedural default for purposes of federal habeas corpus review, so that a federal court is barred from considering such defaulted factual showings.

CONCLUSION

For all the reasons discussed herein, a writ of *certiorari* should issue to review the decision of the United States Court of Appeals, Seventh Circuit.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 85-2761

UNITED STATES OF AMERICA, ex rel. GEORGE DUNCAN,
Petitioner-Appellee,

v.

MICHAEL O'LEARY, Warden,
Respondent-Appellant.

Appeal from the United States District Court
for the Central District of Illinois, Danville Division.
No. 84 C 2368—**Harold A. Baker,** *Chief Judge.*

ARGUED MAY 27, 1986—DECIDED NOVEMBER 24, 1986

Before CUMMINGS, EASTERBROOK and RIPPLE, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This case comes to us on appeal following the district court's grant of petitioner George Duncan's ("petitioner's") petition for writ of habeas corpus. For the reasons set forth below, we affirm the decision of the district court.[1]

[1] In the district court's order of October 1, 1985, the court stated that petitioner was to be discharged from custody unless, within 120 days, he was retried. On October 9, 1985, respondent filed a motion to stay judgment pending appeal. As of May 27, 1986, the date of oral argument in this case, this motion for stay had not been ruled upon. On May 29, 1986, the district court entered a stay *nunc pro tunc* as of October 18, 1985. We therefore address the merits of this appeal.

I

The facts as developed in state post-trial proceedings and the district court's habeas evidentiary hearing are largely as follows: Petitioner was indicted February 19, 1980, for the murder of his girlfriend, Yvette Searle. Initially, petitioner retained Thomas Penn as defense counsel, and petitioner's family paid Penn a fee of $6,000. In April 1980, the family discharged Penn, apparently because Penn insisted that petitioner plead guilty to the murder charge. Petitioner thus needed a defense attorney.

Subsequently, Chris Duncan, petitioner's brother, had occasion to be patrolling on Western Avenue when he saw Assistant State's Attorney Joseph Gibson, defense attorney Dorian LaSaine, and police officer Patricia Bonacum standing outside Gibson's residence. Duncan stopped to talk to Gibson, and LaSaine then joined the conversation. The subject of petitioner's defense and his problems in selecting an attorney arose, and LaSaine told Duncan to come see him about the matter.

LaSaine, Gibson, and Bonacum all played roles in the events that followed. During this time period Gibson was running for State's Attorney of Peoria County. LaSaine and Gibson were close friends and were classmates together in law school. LaSaine was Gibson's campaign manager for this race and continued in this role during petitioner's prosecution which was conducted by Gibson. Gibson's campaign was based upon a "strong law and order" theme, and as such LaSaine and Gibson had publicized a prior murder trial where Gibson had sought the death penalty.

Following the discussion outside Gibson's house, Duncan went to see LaSaine about representing petitioner. LaSaine requested a fee of $7,500 for the case. Petitioner's family decided that this was more than they could afford, and continued to search for an attorney. Norval Hodges was then retained by petitioner for $5,000, with only $1,000 due before the trial.

Several days after petitioner retained Hodges as defense counsel, Duncan encountered Bonacum at the Peoria police

department. Bonacum brought up the subject of petitioner's defense. Bonacum told Duncan that Hodges was not an effective attorney, that he was not known at the courthouse, and that he was "old fashioned." Bonacum further told Duncan that Hodges was trying to get information from the Coroner about petitioner's case when all he had to do was look at the police reports. Bonacum knew both that Hodges was petitioner's attorney and that Hodges was at the Coroner's office as part of his work on the case because her fiance Gibson had previously given her this information. Bonacum then suggested to Duncan that he discuss petitioner's defense further with LaSaine.

Duncan then met again with LaSaine about representing petitioner. This time, LaSaine told Duncan that he would represent petitioner for less than $7,500. Petitioner's family eventually hired LaSaine for $3,500. LaSaine entered his appearance as petitioner's attorney on May 19, 1980, and the trial began May 27, 1980.

LaSaine admitted that he never told Duncan that he was Gibson's campaign manager. LaSaine was not sure whether he had informed petitioner of this fact.

On the day of trial, the court and petitioner engaged in the following colloquy:

> THE COURT: Mr. Duncan, I have been advised that your attorney, Mr. LaSaine, is a campaign manager for the Assistant State's Attorney in this case, Mr. Gibson. Mr. Gibson was running for the office of State's Attorney in the November election, and your attorney, Mr. LaSaine, apparently, is his campaign manager, which means that he would be working on behalf of Mr. Gibson in his election.
>
> DEFENDANT DUNCAN: Yes, sir.
>
> THE COURT: Do you understand that?
>
> DEFENDANT DUNCAN: Yes, sir.
>
> THE COURT: Has Mr. LaSaine told you that?
>
> DEFENDANT DUNCAN: Yes.

THE COURT: All right. And I believe it will be my duty to advise you, Mr. Duncan, that there could arise a possible conflict of interest in Mr. LaSaine's representing you in this case. I'm not saying that it is present nor that it would arise, but I have to make you aware of the fact, and I think Mr. LaSaine has already. But I have to make you aware of the fact that there could be what is known in law as a potential conflict of interest in his representing you in this case, a conflict of interest between his representing you and also by reason of his allegiance to Mr. Gibson because of his activities, political activities.

Do you understand?

DEFENDANT DUNCAN: Yes, sir.

THE COURT: Now, have you hired Mr. LaSaine as your attorney?

DEFENDANT DUNCAN: Yes, sir.

THE COURT: And I want to just give you an example of how this potential conflict of interest could arise, how it could affect you.

It can arise, as I say, because of a dual—not a dual representation but a dual—I want to put this in words so I am sure that you'll understand it.

(Pause.)

During the cross examination of witnesses, for example, Mr. Duncan, it might be necessary for Mr. LaSaine to attempt to show up Mr. Gibson, all right? To show up the evidence that he may be attempting to present against you at your trial. And in a very subtle or a very hidden manner, Mr. LaSaine, if this conflict of interest would affect him, could restrain himself from fully representing you by not vigorously cross examining witnesses.

You understand?

DEFENDANT DUNCAN: Yes.

THE COURT: That's one example of a conflict of interest that I'm talking about to you.

Do you understand?

DEFENDANT DUNCAN: Yes, sir.

THE COURT: All right. I'm, in no way, stating his representation of you would be anything than vigorous and honorable, but I am, in no manner, stating to you that that possibility could not possibly exist anyway because of this allegiance, you might call it, to Mr. Gibson.

DEFENDANT DUNCAN: Yes, sir. I have—

THE COURT: Do you understand what I'm saying to you?

DEFENDANT DUNCAN: Yes, sir.

THE COURT: Do you have any questions that you want to ask me about this problem that I'm discussing with you?

DEFENDANT DUNCAN: Well, yes sir. I have complete confidence in Mr. LaSaine, but I didn't know that he was campaign manager.

THE COURT: Uh-huh.

DEFENDANT DUNCAN: But I have complete confidence in him.

THE COURT: All right. Now, I am, in no way, stating that there is any conflict of interest in this case, but it's my duty as a judge to advise you and let you know that there is always that possibility, and you have the right to waive or to give up any possible conflict of interest that there could be in this case, you see, and that's why I'm stating these facts to you. And I'm asking you now, at this time, knowing what I have said to you and understanding what I've said to you, do you wish Mr. LaSaine to continue to represent you in this case?

DEFENDANT DUNCAN: Yes, sir.

THE COURT: Okay. And you understand that you will be giving up any right that you may have at a later time to complain of Mr. LaSaine's representation of you for the reason that there was a conflict of interest because he is involved with Mr. Gibson and Mr. Gibson's political campaign?

DEFENDANT DUNCAN: Yes.

THE COURT: Okay. That's all.

On July 3, 1980, the trial court held a hearing on petitioner's motion for a new trial. Petitioner, now represented by Jerry Serritella, based his motion for a new trial on his claim that LaSaine labored under a conflict of interest that constituted ineffective assistance of counsel *per se*. At this hearing, in addition to most of the facts previously discussed, it was established that petitioner completed eleventh grade and has worked as a car washer. Although he can read and write, he has difficulty understanding spoken English. He was not familiar with campaign procedures, and apparently did not understand the role and function of a campaign manager. He testified subsequent to the trial that he did not know that LaSaine was Gibson's campaign manager, and that his inconsistent responses stemmed from his lack of understanding of the judge's comments. Nevertheless, the trial court determined that petitioner had effectively waived the conflict of interest issue, and denied his motion for a new trial. He was sentenced to a forty-year term of imprisonment.

The Illinois appellate court affirmed the trial court's decision that petitioner's waiver of the conflict issue was made "knowingly and intentionally." *People v. Duncan*, 97 Ill. App. 3d 896, 899 (3d Dist. 1981). Petitioner then filed a petition for post-conviction relief. The state circuit court denied the petition, ruling that the "issues alleged . . . have been raised or could have been raised in the trial court or at the appellate stage or in fact were litigated at these stages." R. 4, Appendix C. The appellate court affirmed this decision.

On July 31, 1984, petitioner filed a petition for writ of habeas corpus in the district court. On January 17, 1985, the district court set the cause for an evidentiary hearing on the issues of whether LaSaine's representation was adversely affected by an actual conflict and whether petitioner had knowingly waived the conflict. An evidentiary hearing on the petition was held June 7, 1985.

The testimony given at this hearing generally supplemented and expanded upon the pertinent facts as developed in the state proceedings, with one major exception. Patricia Brandt, who was employed as LaSaine's secretary from December of 1979 through April of 1981 and had not previously given testimony relating to petitioner's case, testified at this evidentiary hearing. Her testimony significantly changed the facts that were known at that time.

Brandt testified that she overheard a conversation between Gibson and LaSaine that occurred prior to petitioner's retention of LaSaine as defense counsel. In that conversation, Gibson said it would help the campaign if LaSaine represented petitioner, since Gibson had been assigned to prosecute the case. Gibson also suggested that the case would be of financial benefit to LaSaine. Brandt said that Bonacum apparently was to talk to Duncan and to recommend LaSaine as a good trial lawyer. Bonacum telephoned LaSaine's office to report that she had talked with Duncan about the case. LaSaine was upset when he learned that petitioner had retained Hodges as his attorney. LaSaine subsequently was retained by petitioner.

The district court first determined that petitioner did not knowingly and intelligently waive the issue of his attorney's conflict of interest. The court noted that despite petitioner's inconsistent statements as to whether he knew before trial that LaSaine was Gibson's campaign manager, the trial court failed to make a detailed inquiry into petitioner's actual knowledge of the situation or his knowledge of the role and duties of a political campaign manager. Moreover, neither LaSaine nor Gibson participated in this

discussion between the trial court judge and the petitioner. Additionally, petitioner has a limited educational background.

Having found no waiver, the district court proceeded to analyze petitioner's conflict of interest claim. The court proceeded to apply the standard set forth by the Supreme Court in *Cuyler v. Sullivan*, 446 U.S. 335, 348, 350, *i.e.*, whether there was an actual conflict of interest that adversely affected LaSaine's performance. Giving credit to Brandt's testimony, the court found that an actual conflict of interest existed throughout LaSaine's representation of petitioner, and that this conflict adversely affected LaSaine's performance.

Respondent presses several contentions on appeal. First, respondent argues that petitioner, by arguing in state court that there was a *per se* conflict of interest as opposed to an actual conflict that adversely affected LaSaine's performance, committed a procedural default that prevents him from arguing in this Court that an actual conflict of interest occurred. Second, respondent contends that petitioner failed to present credible evidence of collusion among Gibson, LaSaine, and Bonacum, and with no evidence of collusion the district court erred in concluding that petitioner waived at trial his right to complain of any conflict. Respondent also contends that with no collusion, the district court erred in determining that an actual conflict of interest adversely affected LaSaine's performance.

II

As a general rule, in order to state a claim of ineffective assistance of counsel under the Sixth Amendment, one must show not only that the attorney lacked the requisite degree of professional competence, but also that this lack of competence was so prejudicial that it probably changed the outcome of the criminal defendant's trial. *Strickland v. Washington*, 466 U.S. 668, 691-696; *Walberg v. Israel*, 766 F.2d 1071, 1075 (7th Cir. 1985). However,

the degree of prejudice that must be shown is reduced for certain types of ineffectiveness claims. In certain ineffectiveness claims, such as the actual or constructive denial of the assistance of counsel altogether, prejudice is completely presumed. *Strickland*, 466 U.S. at 692; *United States v. Cronic*, 466 U.S. 648, 658-659, 659 n.25; *Geders v. United States*, 425 U.S. 80 (cited by *Cronic*, 466 U.S. at 659 n.25). If instead defendant's claim is that his attorney was guilty of a conflict of interest, and defendant did not object to this conflict of interest at trial, defendant must show that "an actual conflict of interest adversely affected his lawyer's performance." *Strickland*, 466 U.S. at 692, quoting *Cuyler*, 446 U.S. at 348; *United States v. Marrera*, 768 F.2d 201, 206-207 (7th Cir. 1985). The standard in this latter group of cases (hereinafter referred to as the "*Cuyler* standard") is a limited presumption of prejudice. On the one hand, under the *Cuyler* standard defendant need not show that the trial would probably have come out differently if there had been no conflict of interest, but on the other hand the *Cuyler* standard is not the same as the *per se* rule of prejudice that exists for the ineffectiveness claims listed above. *Strickland*, 466 U.S. at 692; *Walberg*, 766 F.2d at 1075.

The precise scope of the category of claims to which the *Cuyler* standard applies has not been definitively stated by the Supreme Court. In *Cuyler*, the Court applied this limited presumption standard to a conflict of interest claim involving the multiple representation of clients in a single criminal proceeding. The Court, in dicta, subsequently described this *Cuyler* standard as applying generally to a conflict of interest claim, without limiting its application only to multiple representation conflict cases. *Strickland*, 466 U.S. at 692. This Court has applied the *Cuyler* standard for conflict of interest claims generally, and not merely those conflict claims that involve multiple representation of criminal defendants. See, *e.g.*, *Marrera*, 768 F.2d at 206-207 (7th Cir. 1985) (applies standard to case where the alleged conflict is based on the attorney's financial interests). So have courts in other jurisdic-

tions. See cases cited in *Illinois v. Washington*, 105 S. Ct. 442, 443 (three Justices, dissenting from denial of certiorari, note that "numerous federal courts have failed to discern in *Cuyler* any limitation to cases involving multiple representation of defendants," and list these cases). However, the Illinois Supreme Court maintains that the *Cuyler* actual-conflict-of-interest standard is limited to conflict cases involving multiple representation of criminal defendants. *People v. Washington*, 101 Ill. 2d 104 (1984), certiorari denied, 105 S. Ct. 442. See also *People v. Cunningham*, 107 Ill. 2d 143 (1985).

In his post-trial motion in state court, his appeal of the denial of this motion, his state post-conviction proceedings, and his initial memorandum in support of his petition for writ of habeas corpus filed in district court, petitioner relied on pre-*Cuyler* law, particularly *Holloway v. Arkansas*, 435 U.S. 475, in arguing that LaSaine's conflict of interest constituted ineffective assistance of counsel *per se*. Petitioner's claim was denied in the state courts because the courts found that he had waived this constitutional right at trial. The district court subsequently ordered an evidentiary hearing to determine whether the claim was waived, and whether the *Cuyler* standard was met (*i.e.*, whether petitioner's trial counsel represented conflicting interests so that an actual conflict of interest adversely affected counsel's performance). Petitioner's subsequent briefs to the district court and to this Court discussed his claim in terms of the *Cuyler* standard.

Respondent contends that petitioner created a procedural default by arguing his conflict of interest claim in state court in terms of a *per se* standard, rather than the *Cuyler* standard. Respondent thus argues that since there is no cause for this procedural default, and the *Cuyler* standard is the appropriate standard for any type of conflict of interest claim, petitioner is foreclosed from pursuing the conflict of interest claim under the *Cuyler* standard on habeas corpus in the federal courts. It is clear that the failure to raise constitutional deprivations on direct appeal operates as a procedural default and hence

a waiver in Illinois. *Dently v. Lane*, 712 F.2d 1172, 1176 (7th Cir. 1983), quoting *Gains v. People*, 103 Ill. App. 3d 596, 431 N.E.2d 1069, 1070-1071 (1st Dist. 1981). It is equally well settled that "when a procedural default bars state litigation of a constitutional claim, a state prisoner may not obtain federal habeas relief absent a showing of cause and actual prejudice." *Engle v. Isaac*, 456 U.S. 107, 129.

In the instant case, petitioner raised essentially the same claim in both state and federal courts. At all times he has maintained that LaSaine labored under a conflict of interest stemming from his role as Gibson's campaign manager that violated petitioner's Sixth Amendment rights. The *per se* standard (which presumes prejudice) and the *Cuyler* standard (which creates only a limited presumption of prejudice) are simply two different legal standards that in this case are being applied to the same claim—that LaSaine's political relationship with Gibson resulted in a conflict of interest which violated petitioner's Sixth Amendment rights. The arguments made by petitioner differed only because the two jurisdictions (Illinois and the Seventh Circuit) have different legal standards for conflict of interest claims, and petitioner has tailored his arguments in state and federal court to reflect this difference.

Petitioner should not be penalized by the fact that the Illinois Supreme Court and this Court differ on the proper legal standard to use to adjudicate a conflict of interest claim. As noted above, Illinois courts apply the *per se* standard to conflict of interest claims other than those involving multiple representation, whereas this Court and several of our sister circuits apply the *Cuyler* standard to any type of conflict of interest claim. Respondent would have petitioner argue in Illinois state court that the higher *Cuyler* standard should apply to his conflict of interest claim, which would put petitioner in the anomalous position of urging the Illinois courts to adopt a standard for adjudicating a conflict of interest claim that is less favorable to petitioner than Illinois' current view of the appropriate legal standard.

This Court's decisions in *United States ex rel. Tonaldi v. Elrod*, 782 F.2d 665 (7th Cir. 1986) ("*Tonaldi II*"), and *United States ex rel. Tonaldi v. Elrod*, 716 F.2d 431 (7th Cir. 1983) ("*Tonaldi I*") are completely consistent with our reasoning today. Those cases merely recognize the fact that there can be two distinct ineffective assistance of counsel claims arising out of the same case. In *Tonaldi I* and *Tonaldi II*, we noted that a conflict of interest claim can be distinct from a claim that the attorney's decision to represent co-defendants was inconsistent with the minimum standards of competent representation. *Tonaldi I*, 716 F.2d at 436; *Tonaldi II*, 782 F.2d at 667. By contrast, in the instant case, petitioner at all times has pursued a single conflict of interest claim. The mere fact that two different jurisdictions apply different legal standards to the same conflict of interest claim does not make a single conflict of interest claim suddenly become two claims.

Even if petitioner's conduct was somehow construed as constituting a procedural default, the policies behind the doctrine that such a default bars federal habeas relief, see *Wainright v. Sykes*, 433 U.S. 72, mandate that petitioner's conflict of interest claim under the *Cuyler* standard be heard by this Court. We have previously noted that the policy behind this doctrine is to ensure "that the defendant in a state criminal trial gives the state courts a fair chance to correct any federal constitutional errors before he asks the federal courts to nullify his conviction." *Phillips v. Lane*, 787 F.2d 208, 211 (7th Cir. 1986). In the instant case, by raising his conflict claim and arguing the *per se* standard in the Illinois courts, petitioner has given the state courts a full chance to correct any federal constitutional errors. Since Illinois courts apply the *per se* standard to conflict claims of the type raised by petitioner, the Illinois courts would not have had any greater chance to correct constitutional errors if petitioner had argued his claim in terms of the *Cuyler* standard. The concerns of sandbagging and deliberate by-pass, see *Sykes*, 433 U.S. at 89, cited by *Tonaldi II*, 782 F.2d at 668, are not triggered by petitioner's failure to argue the *Cuyler* standard

in a jurisdiction that does not apply that standard for the type of claim raised by petitioner. The district court was therefore free to address the merits of petitioner's claim under the *Cuyler* standard. We proceed to do the same.

III

Before evaluating the substance of petitioner's conflict of interest claim, we must determine if petitioner effectively waived this right at trial. During oral argument, respondent conceded, and we agree, that if the district court was correct to find that LaSaine, Gibson, and Bonacum colluded to secure LaSaine as petitioner's attorney, then petitioner's waiver was ineffective since he could not waive that of which he had no knowledge. See *United States v. Levine*, 794 F.2d 1203, 1206 (7th Cir. 1986) (petitioner must be aware of the conflict in order to effectively waive it). Instead, respondent attacks the district court's finding that there was collusion. Respondent contends that Brandt's testimony, which formed the basis of the district court's finding of collusion, was not sufficient to overcome the presumption under 28 U.S.C. § 2254(d) accorded to the state court's "implicit" finding that there was no such collusion.

The findings made by the state court are not entitled to a presumption of correctness under 28 U.S.C. § 2254(d) for several reasons. First, the determination of the validity of petitioner's waiver is not a purely factual question, but is rather a mixed question of law and fact. *Nash v. Israel*, 707 F.2d 298, 301 (7th Cir. 1983). Second, certain material facts relating to the existence of collusion among LaSaine, Gibson, and Bonacum were not adequately developed at the hearing in state court. Patricia Brandt, LaSaine's secretary, never testified in any state proceeding, and her knowledge of several crucial facts was discovered only just before the habeas evidentiary hearing conducted by the district court. These circumstances substantially undercut any presumption of correctness owed to the state court's findings on this issue. See 28 U.S.C. § 2254(d)(3).

The district court's determination to credit Brandt's testimony and conclusion that collusion did occur was not clearly erroneous. Although Brandt left LaSaine's employ as a result of a disagreement she had with LaSaine over unemployment compensation insurance, there is no evidence that Brandt had a sufficient motive to commit perjury. Unlike Gibson and LaSaine, Brandt lacked any direct personal stake in the outcome of the instant case. Moreover, Brandt's testimony fits in well with the testimony of other witnesses. Wholly apart from Brandt's testimony, it is established that LaSaine was Gibson's campaign manager, that Gibson's campaign was based upon a strong law and order theme, that they had previously publicized a murder trial in which Gibson had sought the death penalty, that Bonacum approached Duncan, criticized Norval Hodges, and urged him to go see LaSaine again about his representing petitioner, and that LaSaine subsequently lowered his fee from $7,500 to $3,500. All of these facts are, at the very least, consistent with a finding that LaSaine, Gibson, and Bonacum worked together to entice petitioner's family to hire LaSaine as petitioner's defense counsel. When Brandt's testimony is added to these separately established facts, the evidence in total strongly supports a finding of collusion among LaSaine, Gibson, and Bonacum. Accepting this finding, respondent concedes that petitioner's waiver at trial of his conflict of interest claim was not valid.

IV

Turning to the merits of petitioner's claim, under the *Cuyler* standard, petitioner must show that there was an actual conflict of interest which adversely affected LaSaine's performance at trial. The district court, after finding that collusion occurred prior to trial, determined that an actual conflict of interest between Gibson and LaSaine existed throughout LaSaine's representation of petitioner. The court further determined that this actual conflict of interest adversely affected LaSaine's performance at trial. The court noted that even though LaSaine entered his

appearance as petitioner's attorney on May 19, 1980, and the trial began on May 27, 1980, LaSaine did not seek a continuance. The court also noted that LaSaine failed to interview the State's witnesses, and that his cross examination of these witnesses at trial was rather limited. The court relied on all of this as well as other aspects of LaSaine's representation of petitioner in concluding that this representation was adversely affected by LaSaine's conflict of interest. Respondent does not disagree with this analysis; rather, respondent contends that the court could not reach this conclusion without a finding of collusion. But since this Court has already determined that the district court's finding of collusion was not clearly erroneous, we must affirm the district court's conclusion that petitioner has met the *Cuyler* standard.

For the reasons set forth above, the decision of the district court is affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
December 22, 1986.

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*

UNITED STATES OF AMERICA, ex rel. GEORGE DUNCAN,
Petitioner-Appellee,

No. 85-2761 v.

MICHAEL O'LEARY, Warden,
Respondent-Appellant.

Appeal from the United States District Court
for the Central District of Illinois, Danville Division.
No. 84 C 2368—**Harold A. Baker,** *Chief Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by respondent-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

No. 84-2368

UNITED STATES OF AMERICA ex rel. GEORGE DUNCAN,
Petitioner,

v.

MICHAEL O'LEARY AND NEIL HARTIGAN,
Respondents.

FINDINGS OF FACTS, CONCLUSIONS OF LAW, AND FINAL ORDER

The petitioner, George Duncan, an inmate at the Stateville Correctional Center, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his petition, the petitioner claims that his conviction was obtained in violation his Sixth Amendment rights. In particular, the petitioner contends that he received ineffective assistance of counsel because his trial attorney labored under a conflict of interest.

I.

State Pre-Trial Proceedings

The petitioner was indicted for the murder of his girlfriend. (Common Law Record 5.) The petitioner was represented at trial by Dorian LaSaine, a private attorney. (C.L. 24.) Immediately prior to trial, the trial judge informed the petitioner that LaSaine was the campaign manager for the prosecutor in the case, Joseph Gibson.

Gibson was running for the office of State's Attorney of Peoria County. The petitioner responded affirmatively when the trial judge asked him if he was aware of LaSaine's political activities on behalf of Gibson. (Tr. 2.) The trial judge then stated that LaSaine's role as Gibson's campaign manager posed a potential conflict of interest. (Tr. 3.) The judge then attempted to give an example of how the conflict of interest could affect the petitioner's case. He stated that LaSaine's loyalty to Gibson could prevent LaSaine from vigorously conducting cross-examination. (Tr. 3-4.)

The following colloquy then occurred:

> THE COURT: Do you have any questions that you want to ask me about this problem that I'm discussing with you?
>
> DEFENDANT DUNCAN: Well, yes, sir. I have complete confidence in Mr. LaSaine, but I didn't know that he was campaign manager.
>
> THE COURT: Uh-huh.
>
> DEFENDANT DUNCAN: I said I knew that they was acquainted, but I didn't know he was campaign manager for Mr. Gibson.
>
> THE COURT: Uh-huh.
>
> DEFENDANT DUNCAN: But I have complete confidence in him.

Tr. 4-5. The trial judge then proceeded to explain that the petitioner may waive the conflict of interest issue:

> THE COURT: All right. Now, I am, in no way, stating that there is any conflict of interest in this case, but it's my duty as a judge to advise you and let you know that there is always that possibility, and you have the right to waive or to give up any possible conflict of interest that there could be in this case, you see, and that's why I'm stating these facts to you. And I'm asking you now, at this time, knowing what I have said to you and understanding what

I have said to you, do you wish Mr. LaSaine to continue to represent you in this case?

DEFENDANT DUNCAN: Yes, sir.

THE COURT: Okay. And you understand that you will be giving up the right that you may have at a later time to complain of Mr. LaSaine's representation of you for the reason that there was a conflict of interest because he is involved with Mr. Gibson and Mr. Gibson's political campaign?

DEFENDANT DUNCAN: Yes.

THE COURT: Okay. That's all.

(Tr. 5-6). The trial then began with jury selection. At the close of all the evidence and following jury instructions, the jury found the petitioner guilty of murder. (Tr. 484.)

II.

State Post-Trial Proceedings

On July 3, 1980, a hearing was held on the petitioner's motion for a new trial. The court granted Dorian LaSaine's motion to withdraw as attorney of record for the petitioner. The petitioner was represented at the hearing by Gerrard Serritella. (Tr. 493.) The basis of the motion for a new trial was ineffective assistance of counsel due to a conflict of interest.

Dorian LaSaine testified that he entered his appearance on behalf of the petitioner and began his trial preparation approximately two to three weeks prior to trial. (Tr. 497, 530.) LaSaine is a close friend of the prosecutor in the case, Joseph Gibson. (Tr. 498-99.) LaSaine was the campaign manager for Gibson in Gibson's race for the office of State's Attorney of Peoria County. (Tr. 499.) Part of LaSaine's duties as Gibson's campaign manager included planning strategy, collecting money, and preparing literature. (Tr. 500.) LaSaine stated that Gibson's campaign was based upon a "strong law and order" theme. (Tr. 501.) Indeed, LaSaine and Gibson had publicized a prior murder trial where Gibson had sought the death penalty. (Tr. 501-02.)

LaSaine testified that Patricia Bonacum had told him that Chris Duncan, the petitioner's brother, was interested in having LaSaine represent the petitioner. At that time, Bonacum was a Peoria police officer and Gibson's fiance. (Tr. 502.) LaSaine further stated that he had not asked Bonacum to talk with Chris Duncan about the case, and that he had not discussed the case with Gibson prior to his retention. (Tr. 503, 527, 532.) LaSaine testified that Chris Duncan was not sent to him by a third party and that Duncan indicated that he was dissatisfied with the attorney representing his brother. (Tr. 514.) LaSaine stated that he did not tell Duncan that he was Gibson's campaign manager, although Duncan knew that LaSaine and Gibson were good friends. (Tr. 515.)

LaSaine stated that he mentioned to the petitioner that he was Gibson's campaign manager during one of their first meetings. (Tr. 503-04.) LaSaine testified that the petitioner apparently already knew of his status as Gibson's campaign manager. (Tr. 504.) LaSaine also stated that he again told the petitioner of his role as Gibson's political manager before the trial began. (Tr. 517-18.) While LaSaine believed that his representation of the petitioner carried with it the appearance of impropriety, he did not believe that a conflict of interest existed. LaSaine did not believe that an acquittal of the petitioner would have adversely affected the campaign. LaSaine testified that no exploitation of the case for political purposes was anticipated, since he believed that the case was "so clear cut" for the prosecution. (Tr. 505.) LaSaine did acknowledge, however, the media attention focused on the trial, including photographs of the petitioner, LaSaine, and Gibson. (Tr. 506.)

LaSaine further testified that, as part of an attempt to reduce the charge against the petitioner, he arranged for a polygraph examination of the petitioner. (Tr. 508-09.) The examination occurred approximately one week before trial. LaSaine received the final report "much later," but received the oral results on the day of the examination. (Tr. 509, 523.) The thrust of the examination concerned

the issue of knowledge. (Tr. 510-11.) LaSaine stated that the petitioner did poorly on the examination. (Tr. 509, 512.) Accordingly, the State did not reduce the charge against the petitioner. (Tr. 512.)

Chris Duncan, the petitioner's brother and a Peoria police officer, testified that the Duncan Family first retained Thomas Penn to represent the petitioner. The family paid Penn a fee of $6,000. (Tr. 536.) In mid-April, 1980, the family discharged Penn because he insisted that the petitioner plead guilty to the murder charge. (Tr. 537.) Penn did not return any part of the fee. (Tr. 538.) The family then had no money immediately available to retain another attorney. (Tr. 539.)

Duncan further testified that, while on patrol, he stopped on the street near Gibson's residence to discuss a pretrial conference in an unrelated case with Gibson. Duncan stated that LaSaine also came up to the car and told Duncan to come see him about George's case. (Tr. 539.) Duncan later went to LaSaine's office to discuss George's case. LaSaine requested a fee of $7500 in advance for the case. The family, however, could not raise $7500, and instead, the family retained Norval Hodges for a fee of $1,000. (Tr. 540, 542.) Hodges entered his appearance on May 7, 1980. (Tr. 543.)

Several days after Hodges was retained, Chris Duncan met with Patricia Bonacum at the Peoria police department. (Tr. 544.) He had known Bonacum for approximately one and one-half years. (Tr. 550.) Duncan testified that, following a casual conversation, Bonacum stated that Hodges was an ineffective attorney and that Duncan should again discuss the case with LaSaine. (Tr. 545-46.) Duncan stated that Bonacum initiated the conversation. (Tr. 546-47.) Based upon Bonacum's representations, Duncan returned to LaSaine's office and worked out financial arrangements for LaSaine to represent his brother. (Tr. 552-58.)

The petitioner, George Duncan, testified. He has completed the eleventh grade and has worked as a car washer. (Tr. 569.) Although he can read and write, he has difficulty

understanding spoken English. (Tr. 569-70.) The petitioner also testified that his first attorney, Thomas Penn, wanted him to plead guilty to murder. (Tr. 571-72.) Penn subsequently was discharged, but the family did not recover any of the $6,000 paid to Penn. (Tr. 572.) Norval Hodges was hired as the petitioner's second attorney. (Tr. 573.) The petitioner's brother, Chris Duncan, told the petitioner that Hodges had not practiced law actively for a period of time and thought that Hodges might not be the best choice. (Tr. 574.) Dorian LaSaine then began his representation of the petitioner.

The petitioner testified that LaSaine did not disclose that he was Gibson's campaign manager. (Tr. 575.) The petitioner further stated that he had no actual knowledge that LaSaine was Gibson's campaign manager. (Tr. 580-81.) Indeed, the petitioner told the trial judge that he knew LaSaine and Gibson were friends, but did not know that LaSaine was Gibson's campaign manager (tr. 4-5, 581) and that petitioner's inconsistent responses to the trial judge were the result of a lack of understanding of the judge's comments. (Tr. 581-82.) The petitioner apparently had no comprehension of the role and function of a campaign manager. (Tr. 583.)

The petitioner stated that he decided, in part, to keep LaSaine as his attorney because the Duncan family had no remaining funds with which to hire a different attorney. (Tr. 584-85.) The petitioner's family had raised $3500 to hire LaSaine. (Tr. 585.) The petitioner could not specify how LaSaine performed inadequately, but claimed ineffectiveness on the fact that LaSaine did not disclose his political relationship with Gibson (tr. 585) and that LaSaine did not seek a continuance of the case following the petitioner's polygraph examination. (Tr. 598.)

Patricia Bonacum testified that she discussed the petitioner's case with Chris Duncan at the Peoria police department. (Tr. 614.) Bonacum testified that, following a discussion regarding police promotions, Duncan initiated conversation about his brother's case. (Tr. 616-17.) Bonacum

said she told Duncan that Hodges was "old fashioned" (tr. 618), but denied that she ridiculed Hodges. (Tr. 618-19.) She told Duncan, she testified, that Dorian LaSaine could work out favorable financial arrangements for the family, but denied that LaSaine had told her to approach Chris Duncan about the case. (Tr. 619-20.) Bonacum stated that she did not know why Duncan talked with her about the petitioner's defense. (Tr. 621.)

On cross-examination, however, Bonacum stated that she initiated the discussion with Chris Duncan concerning his brother's case. (Tr. 623-26.) She further elaborated that she had told Chris Duncan that Hodges was not known at the courthouse and that Hodges was not pursuing discovery properly in the case. (Tr. 626.) She further testified that her finace, Joseph Gibson, had informed her that Hodges was representing the petitioner and that Chris Duncan had seen LaSaine about taking the case prior to retaining Hodges. (Tr. 627.) Bonacum denied, however, that she told Chris Duncan that LaSaine was a better attorney than Hodges. (Tr. 628.)

Joseph Gibson testified that he had not requested his finance, Patricia Bonacum, to discuss the petitioner's case with Chris Duncan. (Tr. 638.) Gibson stated that he did not know that LaSaine would be representing the petitioner until LaSaine entered his appearance in mid-May. Gibson said that he did not discuss the relative merits of particular defense attorneys with Chris Duncan. (Tr. 639.) Gibson also denied that an agreement was reached to reduce the charge against the petitioner if the petitioner passed a polygraph examination. (Tr. 645.)

Based upon this testimony, the trial court denied the petitioner's motion for a new trial. The court stated that a potential conflict of interest existed, but that the petitioner effectively waived the issue. (Tr. 686.) The court then sentenced the petitioner to a forty-year term of imprisonment. (Tr. 706.)

III.

State Appellate Proceedings

On appeal, the Illinois Appellate Court found the petitioner's waiver of the conflict issue was made "knowingly and intentionally." *People v. Duncan*, 97 Ill. App.3d 896, 899 (1981). In its ruling, the Appellate Court focused upon the limited options facing the trial judge in the case. The Appellate Court noted that the trial judge could not have removed the petitioner's retained counsel, and similarly, the public interest would not have been served by the removal of the prosecutor. *Id.* at 898. Gibson was found to be "uniquely qualified to handle the prosecution" due to his pretrial preparation and general familiarity with the case. *Id.* The Appellate Court concluded that the trial judge faced "an unfortunate situation that could not be avoided in these unique circumstances." *Id.*

IV.

Habeas Evidentiary Hearing

In the instant habeas proceeding, an evidentiary hearing was conducted on June 7, 1985, on the petitioner's claim of ineffective assistance of counsel. The petitioner was represented by the Office of the State Appellate Defender and supplemental briefs were submitted.

At the hearing, the petitioner's brother, Chris Duncan, took the stand and basically reiterated his testimony given at the motion for a new trial. Duncan testified that Thomas Penn was initially retained to defend the petitioner and was paid a $6,000 fee. Penn subsequently was discharged, but the family did not recover any of the $6,000. Duncan stated that, following Penn's discharge, he met Dorian LaSaine and Joseph Gibson near Gibson's home. LaSaine initiated a conversation about the petitioner's case. LaSaine requested $7500 as a fee in advance to represent the petitioner. Duncan testified that his family did not have $7500 at that time, and the Duncan family then hired Norval Hodges who required a $1,000 fee.

Duncan further testified that Patricia Bonacum suggested that he discuss George's defense further with LaSaine and that LaSaine then lowered his fee to $3500 to represent the petitioner. The petitioner approved of his family's actions in firing Hodges and retaining LaSaine.

LaSaine began his representation of the petitioner approximately two weeks prior to trial. Chris Duncan testified that he asked LaSaine about obtaining a continuance, but that LaSaine responded that the trial judge would not want to continue the case. Duncan stated that he did not know that LaSaine was Gibson's campaign manager until the trial began. Duncan was called as a State's witness at his brother's trial. Duncan stated that LaSaine never discussed his testimony with him prior to trial.

In addition, the petitioner has submitted affidavits from other State's witnesses who were not contacted by LaSaine prior to trial. These witnesses include police officers, experts, and other material witnesses. This expansion of the record was made pursuant to Rule 7, Rules Governing § 2254 Cases in the United States District Courts.

Patricia Brandt, LaSaine's former secretary, testified that she was employed by LaSaine during the time of the petitioner's trial. She stated that LaSaine and Gibson were very close friends and that LaSaine was Gibson's campaign manager. Indeed, LaSaine's office was Gibson's campaign headquarters. Brandt stated that she overheard a conversation between Gibson and LaSaine prior to LaSaine's retention as the petitioner's defense counsel. In that conversation in LaSaine's office, Gibson stated that it would be good for the campaign if LaSaine were hired to represent the petitioner, since Gibson had been assigned to prosecute the case. Gibson also suggested that the case would be of financial benefit to LaSaine. Brandt said that Patricia Bonacum apparently was to talk with Chris Duncan and to recommend LaSaine as a good trial lawyer. Brandt testified that Bonacum telephoned LaSaine's office to report that she had talked with Chris

Duncan about the case. Brandt said that LaSaine was upset when he learned that the Duncan family had hired Hodges. Brandt stated that LaSaine wanted Bonacum to talk with Chris Duncan again, but Gibson said to "cool it." LaSaine subsequently was retained by the Duncan family.

Brandt testified that she had asked LaSaine if the petitioner and his brother were aware that LaSaine was connected with Gibson's campaign. LaSaine did not answer Brandt's question. She stated that she also asked LaSaine the same question after LaSaine's first meeting with the petitioner. LaSaine told Brandt that the petitioner was "slow," but that his brother must know of LaSaine's involvement in Gibson's campaign. Brandt further testified that, during the trial, she asked LaSaine if he had told the petitioner that he was the prosecutor's campaign manager. LaSaine replied that he did not tell the petitioner of his political relationship with Gibson, but that the trial judge had disclosed the information.

The petitioner, George Duncan, then took the stand and repeated his testimony given at the hearing on his motion for a new trial. The petitioner can read and write, but it is obvious that he is a man of limited intellectual capabilities with little command of the English language. He stated that he did poorly in school and took no civics or government classes and, while he knew nothing about elections, he has voted.

The petitioner testified that LaSaine never informed him that he was the prosecutor's campaign manager but that the trial judge told the petitioner of LaSaine's political relationship with Gibson immediately before trial. The petitioner admitted that he knew LaSaine and Gibson were close friends, but denied having any actual knowledge of LaSaine's role or duties as Gibson's campaign manager. The petitioner further testified that his family did not recover any of the approximately $7,000 paid to his first two attorneys, Penn and Hodges.

Dorian LaSaine was called as a witness and testified that he entered his appearance as the petitioner's attorney

on May 19, 1980, and that the trial began on May 27, 1980. LaSaine and Gibson were friends through law school and later worked together as Assistant State's Attorneys. As Gibson's campaign manager, LaSaine devised campaign strategy, produced campaign publicity, and supervised fund raising.

LaSaine stated that he received a telephone call from Chris Duncan in May, 1980, during which they discussed the representation of the petitioner. LaSaine testified that he told Duncan that he would represent his brother for $7500, but the Duncan family decided not to retain LaSaine at that time. LaSaine testified that Chris Duncan eventually returned to tell him that the family wanted to hire LaSaine, but that they had retained Hodges. LaSaine said that at that meeting he told Chris Duncan that he would represent the petitioner for less than the original fee of $7500. The Duncans eventually hired LaSaine for $3500. LaSaine denied that he used Gibson or Patricia Bonacum to influence Chris Duncan's decision.

LaSaine testified that prior to trial, he saw the petitioner every other day. LaSaine, however, could not recall whether he told the petitioner that he was Gibson's campaign manager. He stated that he discussed the case with the petitioner, exchanged discovery with the State, and viewed the exhibits. Based on this effort, LaSaine concluded that the petitioner had committed manslaughter, not murder. LaSaine testified that he worked to obtain a plea agreement for manslaughter. LaSaine stated, however, that the results of a polygraph examination were not favorable to reaching a plea agreement. LaSaine said that he talked with Gibson and with another assistant prosecutor, Douglas Reymore, about the question of the necessary intent and knowledge but no plea agreement was reached. The petitioner, LaSaine said, did not express dissatisfaction with his efforts.

On cross-examination, LaSaine admitted that he did not tell Chris Duncan that he was Gibson's campaign manager. Patricia Bonacum, however, had told LaSaine of her

conversation with Chris Duncan and of Duncan's dissatisfaction with his brother's lawyers. LaSaine also stated that he could not recall whether he told the petitioner that he was Gibson's campaign manager. LaSaine, the court notes, did not enter into the waiver colloquy between the petitioner and the trial judge, even when the petitioner stated that he did not know that LaSaine was Gibson's campaign manager. LaSaine also testified that he did not seek a continuance, even though he had approximately ten days to two weeks to prepare for a murder trial.

Finally, the Assistant State's Attorney who prosecuted the case, Joseph Gibson, testified that no collusion existed to entice Chris Duncan into hiring LaSaine. Gibson further testified that he expressed concern to the State's Attorney when he learned that LaSaine would be representing the petitioner, but that the State's Attorney wanted him to remain on the case. Gibson stated that the case was neither used nor intended to be used for campaign publicity.

V.

Discussion

The first question the court must answer is whether the petitioner effectively waived the issue of conflict of interest on the part of his lawyer. A waiver of a fundamental right must be made knowingly and intelligently. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1937). A waiver determination must take into consideration the particular facts and circumstances surrounding a case, including the background, experience, and conduct of the accused. *Id. See also United States v. Gaines*, 529 F.2d 1038, 1043-44 (7th Cir. 1976); *People v. Stoval*, 40 Ill. 2d 109, 114 (1968). An accused must receive sufficient information or advice to make a choice between meaningful options. *United States ex rel. Tonaldi v. Elrod*, 716 F.2d 431, 435 (7th Cir. 1983). In other words, a waiver is effective if it is demonstrated that a person "knows what he is doing and his choice is

made with his eyes open." *Faretta v. California*, 422 U.S. 806, 835 (1975). Every reasonable presumption must be made against a finding of waiver, particularly with as fundamental a right involved as effective assistance of counsel. *See Glasser v. United States*, 315 U.S. 60, 70 (1942).

In a habeas proceeding this court makes its own determination of the existence of a waiver through the application of federal legal principles to the facts in the record. *Nash v. Israel*, 707 F.2d 298, 301 (7th Cir. 1983). Thus, the court is not bound by the ruling of the Illinois Appellate Court in this case. *See Sumner v. Mata*, 455 U.S. 591, 597-98 (1982).

It is the respondent's burden to show that the petitioner knowingly and intelligently waived the conflict issue. *See United States ex rel. Vriner v. Hedrick*, 500 F. Supp. 977, 984 (C.D. Ill. 1980). The record does not support the conclusion that the petitioner knowingly and intelligently waived the issue of his attorney's conflict of interest.

Where the potential for a conflict of interest exists, a trial court usually cannot foresee with precision if the conflict will manifest itself. This case, however, did not involve the *potential* for a conflict of interest, as in a case involving joint representation of criminal defendants. Instead, the relationship between LaSaine and Gibson constituted an *actual* existing conflict of interest involving conflicting loyalties and suspect motivation which continued throughout the trial. The trial judge discussed this conflict with the petitioner, but only just before the trial began. (Tr. 2-6.) The petitioner responded initially that he understood that LaSaine was the prosecutor's campaign manager, (tr. 2.) and the trial jduge properly gave an example of how the conflict of interest could affect the representation of the petitioner. (Tr. 3-4.) *See United States ex rel. Tonaldi v. Elrod*, 716 F.2d 431, 437 (7th Cir. 1983). The petitioner replied that he understood what the judge had told him. (Tr. 4.)

Then the petitioner contradicted his earlier remarks. He said that, while he had confidence in LaSaine, he did not

know that LaSaine was Gibson's campaign manager. (Tr. 4-5.) The trial judge replied with mere acknowledgements of the petitioner's statements. (Tr. 4-5.) Despite the petitioner's inconsistent statements concerning the crux of the waiver issue, the trial judge did not make a detailed inquiry into the extent of the petitioner's actual knowledge of the situation, or of the petitioner's knowledge of the role and duties of a political campaign manager. Instead, the trial judge simply began to explain the effect of a waiver of the conflict issue. (Tr. 5-6.)

A court cannot presume that a criminal defendant can understand, on his own, the complex aspects of a conflict of interest. *United States v. Gaines*, 529 F.2d 1038, 1043 (7th Cir. 1976). The trial judge is required to question the defendant about his knowledge of the conflict and his appreciation of the perils of being represented by an attorney "serving two masters." *United States ex rel. Vriner v. Hedrick*, 500 F. Supp. 977, 981 (C.D. Ill. 1980). The trial judge did not attempt to determine whether the petitioner actually understood that LaSaine was Gibson's campaign manager and whether he comprehended the extent of LaSaine's duties and loyalties to Gibson, particularly after the petitioner's obvious contradictory responses to the judge's questions. A more detailed inquiry should have been made by the trial judge once it was evident that the petitioner did not fully comprehend the extent or nature of the conflict. *See United States v. Donahue*, 560 F.2d 1039, 1042 (1st Cir. 1977). Nothing exists in the record which shows that LaSaine adequately discussed his role as Gibson's campaign manager with the petitioner. LaSaine planned campaign strategy, collected contributions, and prepared campaign publicity. (Tr. 499-501.) The campaign publicity even included a previous murder trial where Gibson had sought the death penalty. (Tr. 501.) Unfortunately, neither LaSaine nor Gibson entered into the discussion between the judge and the petitioner concerning the conflict of interest and the trial judge's response to the conflict of interest also was inadequate. *See United States ex rel. Ballard v. Bangston*, 702 F.2d 656, 662 (7th

Cir. 1983) citing *Dentley v. Lane*, 665 F.2d 113, 116-17 (7th Cir. 1981). The trial judge did not describe the duties of a campaign manager following the petitioner's statements that he did not know that LaSaine was Gibson's campaign manager. The testimony of the petitioner, Chris Duncan, and Patricia Brandt, which I credit, indicates that the petitioner was not aware of the conflict prior to trial.

The petitioner has a very limited educational background. (Tr. 569.) The petitioner says that he did not understand what the judge was saying during the waiver discussion (Tr. 582.) and a lack of a clear understanding of the English language is a factor in finding that a valid waiver did not occur. *See United States ex rel. Tonaldi v. Elrod*, 716 F.2d 431, 437 (7th Cir. 1983). In addition, the petitioner felt pressure not to make any changes in his representation at the last minute, as he had previously hired and dismissed two attorneys at a cost of approximately $7,000. (Tr. 536, 584-85.) The problems in retaining counsel caused the petitioner to become emotionally upset. LaSaine had been retained at a cost to his family of $3500 following an initial demand of $7,500. The trial judge made no inquiry into the petitioner's financial means to hire another attorney. The court did not mention the prospect of appointing other counsel to eliminate the conflict, particularly in light of the petitioner's financial status. The trial court also failed to give the petitioner adequate time to consider the nature and impact of the conflict. Based upon LaSaine's representations, the petitioner also believed that a continuance was impossible.

In finding a valid waiver, the Illinois Appellate Court focused upon the "unfortunate situation" facing the trial judge in this case. The Appellate Court concluded that the judge could not remove the petitioner's retained attorney and that the public interest would not be served by the removal of the prosecutor. *People v. Duncan*, 97 Ill. App.3d 896, 898-99 (1981). The focus of a waiver determination, however, must be upon a petitioner's appreciation of the particular facts and circumstances surrounding his or her case. In other words, the determination

of waiver validity must be based upon whether the petitioner's waiver was made knowingly and intelligently. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1937). No such showing has been made in this case. Accordingly, the conflict of interest issue has not been waived for the purposes of habeas review.

VI.

The determination of waiver validity is a mixed question of law and fact, requiring the application of federal legal principles to the facts in the record. *Nash v. Israel*, 707 F.2d 298, 301 (7th Cir. 1983) citing *Cuyler v. Sullivan*, 446 U.S. 335, 342 (1980). The court has found that the state court finding that the petitioner knowingly and intelligently waived the conflict of interest issue is "not fairly supported by the record." 28 U.S.C. § 2254(d)(8). The respondents argue, however, that the "implicit" factual finding that the conflict of interest did not affect LaSaine's performance is entitled to a presumption of correctness under § 2254(d). This "implicit" finding is also a mixed question of law and fact for the purposes of habeas review. *See Cuyler*, 446 U.S. at 342. The respondents further contend that another "implicit" finding was made that LaSaine, Gibson, and Bonacum did not collude to secure LaSaine as the petitioner's attorney. The record before the court, however, reveals that LaSaine, Gibson, and Bonacum did act in concert and that LaSaine's representation of the petitioner was adversely affected by the political relationship between LaSaine and Gibson. The testimony of the witness Brandt reveals the collusion of LaSaine and Gibson.

A criminal defendant is entitled to counsel whose loyalties are unimpaired by a conflict of interest. *Glasser v. United States*, 315 U.S. 60, 70 (1942). The assistance of counsel is among those "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman v. California*, 386 U.S. 18, 23 (1967). To establish a violation of the Sixth Amendment

right to effective assistance of counsel, a petitioner who raised no objection to a conflict of interest at trial "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). Once such a showing is made, prejudice is presumed. *Id.* at 349-50. At least in the joint representation context, proof of an actual conflict is not required when a defendant's attorney objects to the joint representation and the trial court overrules the objection without exploring the basis of the objection or the adequacy of the representation in the face of a potential conflict of interest. *Holloway v. Arkansas*, 435 U.S. 475, 487-91 (1978). *Cuyler* requires that an attorney's performance on behalf of a criminal defendant be adversely affected as a result of the conflict of interest. *See also Strickland v. Washington*, 52 U.S.L.W. 4565, 4571-72 (U.S. May 14, 1984).

The conflict of interest in this case differs in kind from the potential conflict involved in cases of joint representation of criminal defendants. In this case, the political relationship between Gibson, the candidate, and LaSaine, his manager, continued throughout LaSaine's representation of the petitioner. LaSaine actively worked for Gibson's political advancement. In that sense, the conflict of interest was real, not merely a possibility. In a joint representation case, a conflict of interest is merely a possibility until it manifests itself at trial to the detriment of one or more of the joint defendants. The United States Supreme Court has recognized that "a possible conflict of interest inheres in almost every instance of joint representation." *Cuyler*, 446 U.S. at 348. Consequently, the actual conflict of interest in this case involving a close political relationship between the prosecutor and the defense attorney appears to differ dramatically from a potential conflict in the joint representation context. *See e.g. People v. Washington*, 101 Ill.2d 104, 110-115 (1984), *cert. denied Washington v. Illinois*, 53 U.S.L.W. 3363 (U.S., Nov. 13, 1984); *People v. Coslet*, 67 Ill.2d 127 (1977); *People v. Stoval*, 40 Ill.2d 109 (1968). This case involves subtle

and subconscious political pressures underlying LaSaine's representation of the petitioner.

In this case, the conflict of interest was revealed to the trial court. The testimony of the petitioner, Chris Duncan, and Patricia Brandt, however, reveals that the petitioner was not informed of LaSaine's status as Gibson's campaign manager until the trial judge mentioned the problem immediately before trial. The credible testimony of Patricia Brandt, LaSaine's former secretary, reveals that Gibson and LaSaine met to discuss the petitioner's case in LaSaine's office approximately two weeks prior to LaSaine's retention. Gibson had already been assigned to prosecute the case. Brandt testified, and the court finds, that Gibson and LaSaine agreed to have Patricia Bonacum talk with Chris Duncan and recommend that LaSaine represent the petitioner. Brandt subsequently received a telephone message from Bonacum that she had talked with Chris Duncan about the case. This testimony is consistent with Chris Duncan's testimony that, following a casual conversation, Bonacum brought up the petitioner's case, criticized attorney Hodges, and suggested that LaSaine would work out favorable financial arrangements. Indeed, Brandt asked LaSaine three times whether he had disclosed to the petitioner that he was Gibson's campaign manager. LaSaine realized that the petitioner was "slow," but assumed that Chris Duncan knew of his role as Gibson's campaign manager. Chris Duncan, however, testified that he did not know of the political relationship between LaSaine and Gibson. LaSaine's assumption that Chris Duncan knew that he was Gibson's campaign manager further indicates that neither LaSaine nor Gibson disclosed the situation to the petitioner or his family prior to trial. Brandt's testimony further reveals that LaSaine relied upon the trial judge to disclose his political relationship with Gibson.

Further evidence of collusion between LaSaine, Gibson, and Bonacum exists in the record of the evidentiary hearing and the hearing on the petitioner's motion for a new trial. Patricia Bonacum admitted discussing the peti-

tioner's case with Chris Duncan. (Tr. 616-17.) Bonacum told Duncan that LaSaine could work out a favorable financial arrangement for the representation of the petitioner and that Hodges would not be an effective attorney. (Tr. 618-20.) She told Duncan, for example, that Hodges was not conducting discovery properly in the case. (Tr. 626.) On cross-examination, Bonacum stated that she initiated the conversation with Chris Duncan. (Tr. 623-26.) This testimony lends credence to Brandt's testimony that Gibson, LaSaine, and Bonacum worked to convince Chris Duncan to hire LaSaine to represent the petitioner.

Dorian LaSaine also reduced his retaining fee from $7500 to $3500 after Bonacum had discussed the case with Chris Duncan and referred him back to LaSaine. No evidence exists in the record that this reduction was offered prior to Duncan's conversation with Bonacum. This evidence, particularly in light of the testimony of Patricia Brandt, a disinterested witness, establishes that Gibson, LaSaine, and Bonacum worked in concert to entice Chris Duncan to hire LaSaine to represent his brother. This collusion prior to trial establishes that an actual conflict of interest between Gibson and LaSaine existed throughout LaSaine's representation of the petitioner.

A.

The evidence further establishes that LaSaine began his representation of the petitioner no more than two weeks prior to trial. LaSaine entered his appearance as the petitioner's attorney of record on May 19, 1980, and the petitioner's trial began on May 27, 1980. Before LaSaine was retained, the petitioner had hired and dismissed two other attorneys. The Duncan family did not recover any of the approximately $7000 that it had spent to retain the attorneys. Despite the short length of time until the petitioner's murder trial began, LaSaine did not seek a continuance. LaSaine told Chris Duncan that the trial judge would not want to continue the case.

Failure to seek a continuance becomes more significant when viewed in light of LaSaine's failure to contact and interview material witnesses. Indeed, LaSaine even failed to interview Chris Duncan, the petitioner's brother and a Peoria police officer. Duncan was the first person that the petitioner contacted following his girlfriend's death. The petitioner submitted affidavits from many other State's witnesses who were not contacted by LaSaine prior to trial. Instead of interviewing the State's witnesses, LaSaine concentrated his efforts on a polygraph examination. When the results of the examination proved useless for defense or reaching a plea agreement, LaSaine was left with little or no time to do anything else before trial.

Effective representation hinges on adequate investigation and pretrial preparation. *See Crisp v. Duckworth*, 743 F.2d 580, 583 (7th Cir. 1984). The mere appearance of in-court effectiveness cannot compensate for inadequate pretrial preparation. *See Rogers v. Israel*, 746 F.2d 1288, 1295 n.5 (7th Cir. 1984); *United States ex rel. Spencer v. Warden, Pontiac Correctional Center*, 545 F.2d 21, 24-25 (7th Cir. 1976). While LaSaine cross-examined witnesses and made timely objections, it does not automatically follow that his cross-examination was effective. *See Spencer*, 545 F.2d at 24. Indeed, LaSaine's cross-examination of the State's witnesses at trial was rather limited. This limited questioning could be an indication of lack of preparation during the mere two weeks prior to trial. LaSaine may have been forced to conduct discovery through his cross-examination that ordinarily would have been done before trial.

The respondents emphasize that LaSaine reviewed the discovery materials provided by the state and had consulted with the petitioner. Consequently, LaSaine decided to prove that the petitioner lacked the requisite *mens rea* for murder through the use of a polygraph examination. LaSaine's efforts to utilize the polygraph examination were unsuccessful and left him with little or no time in which to interview the great majority of the State's witnesses. The respondents claim that interviewing these witnesses could not have been fruitful because of LaSaine's

decision to concentrate on the petitioner's lack of the requisite intent to commit murder. Accordingly, the respondents allege that LaSaine's decision to rely on the petitioner's own testimony was most reasonable.

LaSaine, however, could have attacked the intent requirement through cross-examination as well. His failure to interview the State's witnesses prevented any such relevant cross-examination. "The essence of sharp, probative cross-examination is preparation and analysis of earlier statements of witnesses." *Spencer*, 545 F.2d at 24. Diligent investigation also may help an attorney develop or even discover a defense, locate witnesses, or unveil impeachment evidence. *Crisp*, 743 F.2d at 583. LaSaine's failure to interview the State's witnesses precluded effective cross-examination. Reliance on police statements and records cannot generally serve as an adequate substitute for a personal interview. *Crisp*, 743 F.2d at 584. An attorney also should do more investigation than merely interviewing the defendant. *See McQueen v. Swenson*, 498 F.2d 207, 216 (1974). LaSaine's decision to rely upon the results of a polygraph examination cannot excuse his failure to seek a continuance and to interview the prosecution's witnesses.

At trial, LaSaine called only one witness other than the petitioner. The testimony of the petitioner's landlord was inconsequential. The petitioner's defense then relied heavily upon the cross-examination of the State's witnesses, as well as the testimony of the petitioner himself. The failure to interview the great majority of the State's witnesses, however, prevented meaningful cross-examination of these witnesses. The cross-examination which occurred was largely insubstantial, particularly in light of LaSaine's efforts to prove that the petitioner lacked the requisite intent for murder. In addition, LaSaine was very deferential to Gibson's "eloquence" during his opening statement and closing argument. (Tr. 22, 466.) LaSaine's failure to interview witnesses for the prosecution suggests that he failed to prepare adequately for the case in the two weeks prior to trial. The court concludes that the petitioner's

representation was adversely affected by the conflict of interest involving the political relationship between Gibson and LaSaine.

B.

An attorney owes a client a duty of loyalty which includes a duty to avoid conflicts of interest. *Strickland v. Washington*, 52 U.S.L.W. 4565, 4570 (U.S., May 14, 1984). A criminal defendant has a right to a defense counsel whose undivided loyalties lie with his accused client. *United States ex rel. Vriner v. Hedrick*, 500 F. Supp. 977, 982 (C.D. Ill. 1980) *citing Glasser v. United States*, 315 U.S. 60, 76 (1942). Indeed, the right to effective assistance of counsel is too absolute to allow courts to indulge in nice calculations as to a specific amount of prejudice arising from its denial. *Glasser*, 315 U.S. at 76. In this case, the actual adverse effect on the petitioner's representation resulting from the conflict of interest lies in both what counsel did and refrained from doing. *See Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1978). Specific evidence exists in the record which reveals that the petitioner's representation was adversely affected by LaSaine's political relationship with Gibson and their collusive behavior in inducing Chris Duncan to hire LaSaine as the petitioner's attorney.

Gibson violated his responsibility to avoid the appearance or the reality of a conflict of interest with respect to his prosecutorial duties. *See* A.B.A. Standards: The Prosecution Function, § 1.2(a), (b)(i) (1971). Gibson should have sought a continuance to permit another prosecutor to assume his trial duties. *See also* The Prosecution Function, § 2.3(d). Similarly, LaSaine's inadequate preparation and his role as the prosecutor's campaign manager cast a shadow upon the integrity of the petitioner's representation. *See* A.B.A. Standards: The Defense Function, §§ 1.1(b), 3.5, 4.1 (1971).

Taking into account the conduct of Gibson and LaSaine, the performance of counsel at trial, the lack of pretrial

opportunity to prepare, and the serious nature of the charge against the petitioner, the court concludes that the conflict of interest adversely affected the petitioner's representation to such an extent that habeas relief is warranted. The conflict of interest involving LaSaine's services as Gibson's campaign manager sufficiently undermines confidence in the integrity of the petitioner's representation to warrant the issuance of a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

IT IS THEREFORE ORDERED that the petitioner's petition for a writ of habeas corpus be, and hereby is, allowed.

IT IS FURTHER ORDERED that the petitioner, George Duncan, be discharged from custody unless, within one hundred twenty (120) days from the date of this order, he is retried for the offense for which he is currently incarcerated.

ENTER this 1st day of Oct., 1985.

/s/ HAROLD A. BAKER
Chief U.S. District Judge

APPENDIX D

PEOPLE of the State of Illinois,
Plaintiff-Appellee,

v.

George DUNCAN, Defendant-Appellant.

No. 80-399.

Appellate Court of Illinois,
Third District.

July 10, 1981.

HEIPLE, Justice:

After a jury trial, defendant was convicted of murder and sentenced to a 40 year term. In a post-trial motion, defendant claimed that his attorney was operating under a conflict of interest that denied him the effective assistance of counsel. He asks for a new trial. Alternatively, he asks that his sentence be reduced. No other issues are raised.

What are the facts? On May 19, 1980, Defendant, George Duncan, hired Attorney Dorian LaSaine to defend him in this cause. At that time, and prior thereto, Mr. LaSaine was the political campaign manager for Joseph Gibson, an assistant Peoria County State's Attorney. Mr. Gibson was a candidate for the office of Peoria County State's Attorney. Gibson and LaSaine were close personal friends and had professional encounters in criminal cases. In his political campaign, Mr. Gibson marketed himself as a prosecutor with a fervent anti-crime posture. He prosecuted George Duncan.

Before trial the circuit judge was informed of the association of the prosecutor and defense counsel. He sum-

moned Mr. Duncan to the bench in the presence of both attorneys and apprised him of the possibility of conflicting interests. He explained how such a conflict, on Mr. LaSaine's part, could harm his defense. Then the following exchange transpired:

> "THE COURT: Do you have any questions that you want to ask me about this problem that I'm discussing with you?
>
> DEFENDANT DUNCAN: Well, yes, sir. I have complete confidence in Mr. LaSaine, but I didn't know that he was campaign manager.
>
> THE COURT: Uh-huh.
>
> DEFENDANT DUNCAN: I said I knew that they was acquainted, but I didn't know he was campaign manager for Mr. Gibson.
>
> THE COURT: Uh-huh.
>
> DEFENDANT DUNCAN: But I have complete confidence in him."

Finally the trial judge asked:

> "THE COURT: * * * And I'm asking you now, at this time, knowing what I have said to you and understanding what I've said to you, do you wish Mr. LaSaine to continue to represent you in this case?
>
> DEFENDANT DUNCAN: Yes, sir.
>
> THE COURT: Okay. And you understand that you will be giving up any right that you may have at a later time to complain of Mr. LaSaine's representation of you for the reason that there was a conflict of interest because he is involved with Mr. Gibson and Mr. Gibson's political campaign?
>
> DEFENDANT DUNCAN: Yes."

Following this exchange, the judge allowed the trial to proceed with Mr. LaSaine continuing to act as the defendant's attorney. We think that the trial judge acted properly under the circumstances. These circumstances, how-

ever, should be defined. Mr. LaSaine was the defendant's private hired counsel. The defendant was fully informed as to the conflict of interest situation. The defendant affirmatively stated that he wanted to continue with Mr. LaSaine's services in the case. No objection was raised by the defendant until after his conviction when he filed a post-trial motion. There is no suggestion that Mr. LaSaine's services in the case were deficient in any way. No issue is raised on the pleadings. No issue is raised concerning any other aspect of the trial. The verdict is not challenged save on the basis of this one issue.

Since the defendant fully understood the situation and advised the judge that he wanted to continue with Mr. LaSaine's services, the question must be asked, what choice did the trial judge have at that point? Should the judge sua sponte have removed Mr. LaSaine from the case? We think not. The defendant had hired Mr. LaSaine to represent him. The defendant chose him. The defendant wanted him to stay with the case. Certainly a defendant has a right to counsel of his own choosing. In fact, had the judge forced Mr. LaSaine out of the case, we would no doubt be considering that precise point on appeal instead of the one that is now before us.

It is not inconceivable that the defendant may have sensed an advantage by employing Mr. LaSaine. Maybe he thought the employment of Mr. LaSaine would get him a better deal because of the connection. If he did entertain such thoughts, he was wrong.

A thorough review of the record indicated that a vigorous and effective prosecution was undertaken and that the defendant received an equally effective and vigorous defense. The major impediment suffered by the defendant in this case was that he was guilty and the proof was evident. That aspect of the case turned out to be an insurmountable handicap.

So far as the public is concerned, the appearance in the case of the candidate for state's attorney on one side and his campaign manager on the other presents an unfortu-

nate visage. Though propriety is not damaged in fact, its appearance is. To preserve the appearance of propriety, it would be easy to suggest that it would have been better if one of the two attorneys had gotten out of the case. The reality suggests, however, that Mr. Gibson, by virtue of his familiarity with the case and his pre-trial preparation, was uniquely qualified to handle the prosecution. Mr. LaSaine, on the other hand, was defendant's chosen counsel. The public would not be served by sacrificing defendant's right to counsel of his choice to the phantasmagoria of the appearance of impropriety. Neither would the public be served by removing a prepared and seasoned prosecutor from the case. It is simply an unfortunate situation that could not be avoided in these unique circumstances.

Finally, to follow defendant's theory, would mean that a defendant could premeditatedly manipulate the posture of his case so as to automatically get two trials. The first trial would admittedly and knowingly be undertaken with hired counsel possessing a supposed conflict of interest. The defendant might be acquitted at that trial. If he should lose, however, he would then be in a position to get a trial de novo with new counsel because his first counsel was operating under the cloud of a conflict of interest. Such practice would constitute an abuse of the administration of justice. The word is waiver. The defendant knowingly and intentionally waived his right to claim error for the conflict of interest issue in this case.

Defendant's claim of excessive sentence is also without merit. A sentence imposed within statutory limits will not be reduced merely because we, as a reviewing court, might have imposed different punishment. *People v. Perruquet* (1977), 68 Ill.2d 149, 154, 11 Ill.Dec. 274, 368 N.E. 2d 882. Primary components in fixing a just sentence are the gravity of the offense and circumstances of its commission. The trial judge, after hearing the witnesses and arguments in aggravation and mitigation, concluded the rehabilitative potential of the defendant was outweighed by the brutality of the murder. The trial court considered the defendant's history and found in it nothing compelling

to offset the wanton cruelty which this murder entailed. These considerations were legal and proper. No abuse of discretion occurred.

Accordingly, the judgment of the circuit court of Peoria County is affirmed.

Affirmed.

BARRY and STOUDER, JJ., concur.

EDITOR'S NOTE

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No. 86-1339

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

MICHAEL O'LEARY, Warden,

Petitioner,

-vs-

GEORGE DUNCAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

WHETHER, AS UNANIMOUSLY HELD BY THE SEVENTH CIRCUIT COURT OF APPEALS, AND FULLY SUPPORTED BY THE RECORD IN THIS CASE, RESPONDENT, BOTH IN STATE AND FEDERAL COURTS, RAISED THE SAME CONFLICT OF INTEREST ISSUE FOR REVIEW THEREBY MAKING ANY CLAIM OF PROCEDURAL DEFAULT UNAVAILING.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASON FOR DENYING THE WRIT	3
WHETHER, AS UNANIMOUSLY HELD BY THE SEVENTH CIRCUIT COURT OF APPEALS, AND FULLY SUPPORTED BY THE RECORD IN THIS CASE, RESPONDENT, BOTH IN STATE AND FEDERAL COURTS, RAISED THE SAME CONFLICT OF INTEREST ISSUE FOR REVIEW THEREBY MAKING ANY CLAIM OF PROCEDURAL DEFAULT UNAVAILING	3
CONCLUSION	9

TABLE OF AUTHORITIES

Page

Cases

Cuyler v. Sullivan, 446 U.S. 335, 10 S.Ct. 1708, 64 L.Ed. 2d 333 (1980) 4

Fay v. Noia, 9 L.Ed. 2d 868 5

Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942) 6

Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed. 2d 426 (1978). 6

People v. Coslet, 67 Ill. 2d 127, 364 N.E.2d 67 (1977). . 6

People v. Duncan, 97 Ill. App. 3d 896, 424 N.E.2d 67 (3d Dist. 1981). 3-4

People v. Kester, 66 Ill. 2d 162, 361 N.E.2d 569 (1977) . 6

People v. Washington, 101 Ill. 2d 104, 461 N.E.2d 393 (1984) 6

Price v. Johnston, 334 U.S. 266, 92 L.Ed. 1356, 68 S.Ct. 1049 5

Spencer v. Zant, 715 F.2d 1562 (11th Cir. 1983) 5

Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed. 2d 770 (1963) 5

United States ex rel. Duncan v. O'Leary, 806 F.2d, 1307 (7th Cir. 1986). 4-5,7

Vasquez v. Hillery, ___ U.S. ___, 106 S.Ct. 617, 88 L.Ed. 2d 598 (1986). 7,8

Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed. 2d 594 (1977). 5,6,7

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OPINION BELOW

The opinion of the Seventh Circuit Court of Appeals is reported as United States ex rel. Duncan v. O'Leary, 806 F.2d 1307 (7th Cir. 1986).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Amendment (VI)

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment (XIV)

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Amplification and clarification of petitioner's factual statement have been incorporated within the argument.

REASON FOR DENYING THE WRIT

WHETHER, AS UNANIMOUSLY HELD BY THE SEVENTH CIRCUIT COURT OF APPEALS, AND FULLY SUPPORTED BY THE RECORD IN THIS CASE, RESPONDENT, BOTH IN STATE AND FEDERAL COURTS, RAISED THE SAME CONFLICT OF INTEREST ISSUE FOR REVIEW THEREBY MAKING ANY CLAIM OF PROCEDURAL DEFAULT UNAVAILING.

Petitioner seeks review in this Court claiming, as it has done below, that respondent has procedurally defaulted on his conflict of interest claim since he did not fairly present this claim to the state courts and, as a result, failed to exhaust his state court remedies. Petitioner no longer argues against the fact that the evidence developed at the federal evidentiary hearing clearly established active collusion between defense attorney LaSaine and Assistant State's Attorney Gibson. Nor does petitioner argue, as it did below, that the respondent knowingly and intelligently waived any resulting conflict. The sole remaining issue urged by petitioner is a purported procedural default.

Respondent was originally tried and found guilty in state court for the murder of his girlfriend. In post-trial proceedings, Duncan's original trial counsel withdrew and new counsel was appointed. The basis of the motion for a new trial was ineffective assistance of counsel due to a conflict of interest. That conflict was bottomed on the fact that contemporaneous with his representation of Duncan defense counsel LaSaine was also acting as campaign manager for Assistant State's Attorney Joseph Gibson who was running for State's Attorney and also happened to be the prosecutor in the Duncan case. Following a hearing, the trial court found that a potential conflict of interest existed but that respondent had effectively waived the issue. The court then went on to sentence George Duncan to a forty-year term of imprisonment.

On appeal to the Illinois Appellate Court, it was determined that respondent's waiver of the conflict issue was made "knowingly and intentionally". People v. Duncan, 97 Ill. App. 3d 896,

899, 424 N.E.2d 67 (3d Dist. 1981). A later State post-conviction petition raising the same issue also failed. In all of the state court proceedings, respondent relied on pre-Cuyler law in arguing that original defense counsel, LaSaine, labored under a conflict of interest which constituted ineffective assistance of counsel per se. Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed. 2d 333 (1980).

Respondent then filed a federal habeas corpus petition where he once again raised the conflict of interest issue. The district court subsequently ordered an evidentiary hearing to determine whether the claim was waived and whether the Cuyler standard was met (i.e., whether petitioner's trial counsel represented conflicting interests so that an actual conflict of interest adversely affected counsel's performance).

Prior to the commencement of the federal evidentiary hearing, respondent successfully expanded the record pursuant to Rule 7, Rules Governing §2254 Cases in the United States District Courts, with affidavits from numerous state witnesses. These witnesses included police officers, experts, and other material witnesses who stated that they were never contacted by defense counsel LaSaine prior to trial. LaSaine had begun his representation of Duncan on the charge of murder less than two weeks prior to trial and failed to ever seek a continuance.

For the most part, the evidence adduced at the evidentiary hearing paralleled and expanded upon the evidence developed during the state proceedings. The most notable exception, and the cause of petitioner's concern before this Court, was the testimony of Patricia Brandt who served as LaSaine's secretary from December 1979 through April 1981. Ms. Brandt's testimony clearly established, beyond doubt, active collusion between defense attorney LaSaine and Assistant State's Attorney Gibson (see Appendix of Petitioner's petition, pages 7, 24-25, henceforth, App. 7). In issuing its writ the district court unquestionably so concluded and further found there to be no waiver. The Seventh Circuit Court of Appeals later unanimously affirmed the district court's holding [United States ex rel. Duncan v.

O'Leary, 806 F.2d, 1307 (7th Cir. 1986) and declined petitioner's petition for rehearing and suggestion for rehearing en banc (App. 16).

Petitioner's principal allegation, relying on this Court's opinion in Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed. 2d 594 (1977), appears to be that respondent has procedurally defaulted on his claim of conflict of interest since the state court was not provided a complete opportunity to review and decide the constitutional claim of error. Specifically, the petitioner claims such default since respondent, in state court, urged that there was a per se conflict of interest as opposed to an actual conflict that adversely affected LaSaine's performance. Petitioner particularly objects, as earlier noted, to the introduction, during the federal evidentiary hearing, of the testimony of Patricia Brandt, whose testimony clearly established active collusion on the part of attorneys Gibson and LaSaine.

It is initially important to note that Wainwright v. Sykes did not alter this Court's Townsend standard in the context of whether an evidentiary hearing should be held. Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed. 2d 770 (1963). See Spencer v. Zant, 715 F.2d 1562, 1579 (11th Cir. 1983). In Townsend, this court held in part:

> If, for any reason not attributable to the inexcusable neglect of petitioner, see Fay v. Noia, 9 L.Ed. 2d 868, (Part V), evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing, a federal hearing is compelled. ... Compare Price v. Johnston, 334 U.S. 266, 291, 92 L.Ed. 1356, 1372, 68 S.Ct. 1049: "The primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned. And if for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief." 9 L.Ed. 2d at 788.
>
> . . .
>
> The ... power of inquiry on federal habeas corpus is plenary. Therefore, where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew. 9 L.Ed. 2d at 785.

The district court here properly conducted such a plenary hearing and the facts developed at that hearing are no longer in controversy.

Furthermore, in relying on Wainwright v. Sykes, the petitioner fails to take into account the status of Illinois and federal law regarding conflicts of interest in 1980 when this case arose. Under Illinois law, which recognizes per se conflicts of interest, a defendant does not necessarily have to allege and prove prejudice to gain relief when his attorney labors under a conflict.[1] People v. Washington, 101 Ill. 2d 104, 461 N.E.2d 393, 396 (1984). Such state court decisions as People v. Coslet, 67 Ill. 2d 127, 364 N.E.2d 67 (1977) and People v. Kester, 66 Ill. 2d 162, 361 N.E.2d 569 (1977) had clearly established Illinois law prior to when this case arose. Further, the decision of this Court in Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed. 2d 426 (1978), reinforced the Illinois law. The Illinois Supreme Court recognized that when a conflict of interest comes to the attention of a trial court and the court fails to appoint independent counsel or adequately inquire into the conflict, reversible error automatically occurs. Prejudice is presumed and need not be shown, since the effects of a conflict are invidious and difficult to calculate. Thus, the fact that the petitioner did not sooner develop how the conflict of interest adversely affected counsel's performance properly did not preclude habeas corpus relief. As the habeas court recognized, the respondent took the necessary steps to pursue the conflict of interest issue under the law in effect at the time.

As the Seventh Circuit itself subsequently concluded:

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[1]The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942).

> In the instant case, petitioner raised essentially the same claim in both state and federal courts.[2] At all times he has maintained that LaSaine labored under a conflict of interest stemming from his role as Gibson's campaign manager that violated petitioner's Sixth Amendment rights. The per se standard (which presumes prejudice) and the Cuyler standard (which creates only a limited presumption of prejudice) are simply two different legal standards that in this case are being applied to the same claim -- that LaSaine's political relationship with Gibson resulted in a conflict of interest which violated petitioner's Sixth Amendment rights. The arguments made by petitioner differed only because the two jurisdictions (Illinois and the Seventh Circuit) have different legal standards for conflict of interest claims, and petitioner has tailored his arguments in state and federal court to reflect this difference.
>
> Petitioner should not be penalized by the fact that the Illinois Supreme Court and this Court differ on the proper legal standard to use to adjudicate a conflict of interest claim.... Respondent would have petitioner argue in Illinois state court that the higher Cuyler standard should apply to his conflict of interest claim, which would put petitioner in the anomalous position of urging the Illinois courts to adopt a standard for adjudicating a conflict of interest claim that is less favorable to petitioner than Illinois' current view of the appropriate legal standard. (App. 11)[3]

That Court went on to conclude that even if Duncan's conduct could somehow be construed as constituting a procedural default the doctrine enunciated in Wainwright that such a default bars federal habeas relief nevertheless mandates that respondent's claim under the Cuyler standard be heard. The Seventh Circuit properly concluded that respondent provided the state courts adequate opportunity to correct any federal constitutional error before proceeding to the federal courts (App. 12).

Petitioner also suggests a factual as well as legal procedural default. Citing to this Court's recent opinion in Vasquez v. Hillery, ___ U.S. ___, 106 S.Ct. 617, 88 L.Ed. 2d 598 (1986), petitioner claims that "... Vasquez expressly declined to address the circumstances present in this case, wherein a habeas

---

[2]The precise issues raised in the Third Judicial District Appellate Court regarding the conflict were framed as follows: I. Did a conflict of interest exist due to the fact that counsel for defendant was also campaign manager for the prosecutor; II. Did defendant waive any conflict of interest?

[3]This case is now reported as United States ex rel. Duncan v. O'Leary, 806 F.2d 1307 (Seventh Cir. 1986).

applicant withheld 'essential facts from the state courts' and sought to later use those withheld facts in federal court as a basis for a specific allegation of constitutional error which was likewise never presented the state courts." (Pet. brief 21). However, the Vasquez Court went on to specifically hold:

> "...that the supplemental evidence presented by respondent did not fundamentally alter the legal claim already considered by the state courts, and, therefore, did not require that respondent be remitted to state court for consideration of that evidence".

___ U.S. ___, 88 L.Ed. 2d at 607.

In any event, there is simply no evidence, beyond petitioner's bald assertions, that any essential facts were withheld from the state courts. The Seventh Circuit, based on the record developed in the district court proceedings, properly found that Patricia Brandt's relevant testimony as to the active collusion between LaSaine and Gibson "...was discovered only just before the habeas evidentiary hearing conducted by the district court" (App. 13).

There was no procedural default here. The claim raised by respondent-Duncan regarding defense counsel's conflict of interest was properly raised in both state and federal court. That conflict, based on defense counsel LaSaine's active collusion with Assistant State's Attorney Gibson adversely affected his performance at respondent's trial for murder. LaSaine, although entering the case less than two weeks prior to trial, never sought a continuance; failed to interview witnesses; failed to provide effective cross-examination; and as noted by the district court, was very deferential to Gibson's "eloquence" during his opening and closing argument (App. 37). Respondent has clearly met the standard enunciated by this Court in Cuyler. No compelling need exists for this Court to grant certiorari review.

CONCLUSION

For the foregoing reasons, respondent prays that the petition for Writ of Certiorari be denied.

Respectfully submitted,

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